Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

81-150

IN THE

Supreme Court of the United States

October Term, 1980

No. ———

NORTHERN PIPELINE CONSTRUCTION CO.,
Appellant,

vs.

MARATHON PIPELINE COMPANY,
Appellee,

and

UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, FOURTH DIVISION

JURISDICTIONAL STATEMENT

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July 16, 1981

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NORTHERN PIPELINE CONSTRUCTION CO.,
Appellant,

vs.

MARATHON PIPELINE COMPANY,
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and

UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, FOURTH DIVISION

JURISDICTIONAL STATEMENT

Northern Pipeline Construction Company, appellant, appeals from the judgment and order of the United States District Court, District of Minnesota, Fourth Division, dated April 23, 1981, dismissing appellant's Complaint initiated by adversary proceeding in the Bankruptcy Court against appellee Marathon Pipeline Company and holding that the delegation of authority in 28 U.S.C. §1471 to the bankruptcy judges is an unconstitutional delegation of authority.

OPINIONS BELOW

The order of the United States District Court for the District of Minnesota, Fourth Division, is unreported and is appended at A-1. The memorandum and order of the Bankruptcy Court is unreported; it is appended at A-2 through A-11.

JURISDICTION

The District Court's order and judgment were entered on April 23, 1981.

A notice of appeal to this Court was duly filed by the United States of America (intervenor in the proceedings below) in the District Court for the District of Minnesota, Fourth Division, on May 19, 1981; a notice of appeal was duly filed by appellant in the District Court of Minnesota for the Fourth Division on May 20, 1981.

This appeal is being docketed in this Court within sixty days from the filing of the notice of appeal below. The jurisdiction of this Court is invoked under 28 U.S.C. §1252 and §2101(a).

THE STATUTE INVOLVED

Section 1471 of the Bankruptcy Reform Act, Pub.L.No. 95-598, 95th Cong. 2d sess. (Nov. 6, 1978), 92 Stat. 2549, 2668-2669 (1978), 28 U.S.C. §1471, provides as follows:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings aris-

ing under title 11 or arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

(d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

(e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.

QUESTION PRESENTED

Whether the delegation of authority conferred in 28 U.S.C. §1471 to the bankruptcy judges is a constitutional delegation of jurisdiction.

CONSTITUTIONAL PROVISIONS AND RULES

Article I, Section 8, United States Constitution:

Congress shall have the power:

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To constitute Tribunals inferior to the supreme Court;

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and

all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article III, Section 1, United States Constitution:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behavior. . . .

STATEMENT OF THE CASE

Appellant, Northern Pipeline Construction Company ("Northern"), is a debtor in a proceeding for reorganization under Chapter 11 of the Bankruptcy Code.

On March 8, 1979 (prior to initiation of reorganization proceedings) Northern instituted a lawsuit against the appellee, Marathon Pipeline Company ("Marathon"), in the United States District Court for the Western District of Kentucky. Jurisdiction was based upon diversity of citizenship, 28 U.S.C. §1332 and upon the enforcement of a mechanics lien under Kentucky Revised Statutes, §376.090 pursuant to 28 U.S.C. §1655.

The Complaint therein asserts claims for relief arising out of the construction by Northern for Marathon of certain oil product pipelines in Jefferson County, Kentucky. An Answer and Counterclaim were interposed by Marathon and limited discovery was undertaken by both parties.

On January 14, 1980, Northern filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court, District of Minnesota, Third Division.

On March 25, 1980, Northern, as debtor-in-possession, filed and served a Complaint against Marathon, initiating an adversary proceeding under the Bankruptcy Code. That Complaint asserts the same claims asserted in the lawsuit then pending in the Western District of Kentucky with the exception of the claim for mechanics lien relief.

Appellee Marathon moved the Bankruptcy Court for dismissal for lack of jurisdiction and alternatively for dismissal, abstention or transfer of the adversary proceeding, which motion was denied by the Bankruptcy Court on November 17, 1980.*

Appellee's application to the United States District Court for the District of Minnesota, Fourth Division, for leave to appeal the order of the Bankruptcy Court was denied on March 5, 1981. Upon appellee's motion for reconsideration, the District Court granted appellee's Motion for Leave to Appeal on March 26, 1981.

On April 23, 1981, the District Court entered an order dismissing the adversary proceeding instituted by Northern against Marathon, holding that the delegation of authority in 28 U.S.C. §1471 to the bankruptcy judges is an unconstitutional delegation of jurisdiction.

---

* Prior to its order, the Bankruptcy Court granted leave to intervene to the United States of America pursuant to 28 U.S.C. §2403(a) and Rule 24(a)(1), Federal Rules of Civil Procedure.

THE QUESTION IS SUBSTANTIAL

This appeal presents the issue whether under Article I of the Constitution Congress may establish a Bankruptcy Court of expanded jurisdiction and powers without attending the requirements of Article III.

As enacted by Congress, the Bankruptcy Reform Act of 1978 provides for appointment of judges by the President, by and with the advice and consent of the Senate, for fourteen-year terms. 28 U.S.C. §152, 153. Section 1 of Article III requires that judges vested with judicial power shall be tenured.

The District Court's decision was apparently premised on the view that the creation of the new Bankruptcy Court was an exercise of a "judicial power" of the United States under Article III without the requisites of Article III lifetime tenure and prohibitions against salary reduction.**

This Court has not decided the issue of expanded bankruptcy jurisdiction, although it recently has decided similar issues in favor of constitutionality in *United States v. Raddatz*, 447 U.S. 667 (1980), reh. denied 448 U.S. 916 (1981) and *Palmore v. United States*, 411 U.S. 389 (1973).

Palmore, supra, upheld the constitutionality of legislation for the District of Columbia providing for trying local criminal cases before judges not accorded life tenure and protection against reduction in salary, and this Court stated:

> It is apparent that neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Art. III court before a judge enjoying lifetime

** The District Court issued no memorandum of law, it simply concluded in a one-page order that 28 U.S.C. §1471 was unconstitutional.

> tenure and protection against salary reduction. Rather, both Congress and this Court have recognized that state courts are appropriate forums in which federal questions and federal crimes may at times be tried; and that the requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment. 411 U.S. at 407-408.

Last term in *United States v. Raddatz, supra*, this Court upheld the constitutionality of the Federal Magistrates Act, 28 U.S.C. §636(b)(1)(B), against a challenge on Article III and due process grounds. There the Court stated that Congress made clear that the District Court had plenary discretion whether to authorize a magistrate to hold an evidentiary hearing in a magistrate's capacity in aid of the District Court and under its jurisdiction.

Here, as in *Palmore* and *Raddatz*, the basic powers and functions of an Article I court have been questioned and the administration of the bankruptcy laws of the United States has been jeopardized.

Whether Congress is permitted to constitute tribunals inferior to the Supreme Court so as to administer uniform laws on the subject of bankruptcy without providing an Article III judiciary is a fundamental issue requiring determination by this Court. The decision appealed from the District Court clearly is potentially far-reaching. The impact of this Court's decision with respect to Congress' enactment of a comprehensive Bankruptcy Reform Act, its jurisdiction and powers will be substantial.

CONCLUSION

Appellant asks this Court to note probable jurisdiction of this appeal and to set this case for full briefing and argument.

Respectfully submitted,

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Dated: July 16, 1981.

APPENDIX

APPENDIX A
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil 4-80-589

MARATHON PIPELINE COMPANY,

Petitioner,

vs.

NORTHERN PIPELINE CONSTRUCTION CO.,

Respondent.

ORDER

Lindquist & Vennum, by Melvin I. Orenstein, 4200 IDS Center, Minneapolis, MN 55402.

Briggs & Morgan, by John Devney, 2200 First National Bank Building, St. Paul, MN 55101.

The Court, having heard the arguments of counsel and considered the files, briefs, and all relevant material, has concluded that the petitioner's motion to dismiss is meritorious and that the delegation of authority in 28 U.S.C. §1471 to the Bankruptcy Judges to try cases which are otherwise relegated under the Constitution to Article III judges is an unconstitutional delegation of authority.[1]

[1] Pursuant to 28 U.S.C. §2403(a), Bankruptcy Judge John J. Connelly notified the Attorney General of the United States of this challenge to the constitutionality of 28 U.S.C. §1471 as enacted by Public Law 95-598 (the Bankruptcy Reform Act) on November 6, 1978. The government was represented at the proceeding during

Accordingly, IT IS HEREBY ORDERED That the adversary proceeding instituted by Northern Pipeline Construction Co. against Marathon Pipeline pursuant to the provisions of the Bankruptcy Code is dismissed.

IT IS FURTHER ORDERED That a stay of the provisions of this Order is granted pending appeal.

Dated: April 23, 1981.

MILES W. LORD
United States District Judge

APPENDIX B
UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Proceedings for a Reorganization Under Chapter 11
Case No. 3-80-66

In the Matter of:

NORTHERN PIPELINE CONSTRUCTION CO.,
Debtor,

NORTHERN PIPELINE CONSTRUCTION CO.,
Plaintiff,

vs.

MARATHON PIPELINE COMPANY,
Defendant.

---

which this Court decided to consider the merits of the appeal by an Assistant United States Attorney for the District of Minnesota. At that hearing, both parties and the government agreed to let the Court proceed without further argument on the merits and decide the matter in reliance on the briefs and memoranda already filed in the District Court or Bankruptcy Court, including that of the United States. In concluding that 28 U.S.C. §1471 is an unconstitutional delegation of jurisdiction to an Article I Court, the Court has in fact considered the positions of all three entities.

MEMORANDUM AND ORDER

Adversary Proceeding No. 80-0042

At Saint Paul, Minnesota.

Northern Pipeline Construction Company ("Northern") commenced this adversary proceeding by filing a complaint on March 21, 1980. The Defendant, Marathon Pipeline Company ("Marathon"), responded to said complaint on May 12, 1980, by filing a motion for an order of the Court dismissing the complaint for lack of jurisdiction and alternatively to abstain or transfer this adversary proceeding on the grounds that there is another lawsuit pending in the United States District Court for the Western District of Kentucky containing essentially the same claims for relief which are asserted in these proceedings. The ground asserted in support of the claim of lack of jurisdiction is that the exercise of jurisdiction herein by the Bankruptcy Court is an unconstitutional exercise of the jurisdictional power granted solely to the courts of the United States under Article III, Section 1 of the United States Constitution.

A hearing was held on Defendant's motion pursuant to notice duly given on May 22, 1980 in the United States Court House, 316 North Robert Street, St. Paul, Minnesota. John L. Deveny of the law firm of Briggs and Morgan, St. Paul, Minnesota, appeared on behalf of the Plaintiff and Melvin I. Orenstein of the law firm of Lindquist & Vennum, Minneapolis, Minnesota, appeared on behalf of the Defendant. The Court, subsequent to said hearing, pursuant to 28 U.S.C. §2403 (a) informed the United States Attorney General of the constitutional issue present in this litigation. Thereafter, on September 10, 1980, the United States of America moved the Court to allow the United States of America to intervene in the above-captioned proceedings as a matter of right under rule

24(a)(1), Federal Rules of Civil Procedure and 28 U.S.C. §2403(a). The Court entered its order granting the motion to intervene on September 10, 1980.

Northern is a Debtor in a proceeding for Reorganization under Chapter 11 of the Bankruptcy Code and has commenced the present action against Marathon for damages estimated to be approximately $2,500,000.00 arising out of Marathon's breaches of contract and warranty, misrepresentation, coercion and duress, extra work orders or quantum meruit.

This proceeding is of the sort that this Court had no statutory jurisdiction to hear prior to the passage of the Bankruptcy Reform Act of 1978. The Reform Act created a new court and substantially enlarged the jurisdiction of the former Bankruptcy Courts.

Defendant's motion to dismiss raises a constitutional issue by asserting that the Bankruptcy Reform Act of 1978 has unconstitutionally vested Article III judicial power in non-tenured judges and thus the Bankruptcy Court is barred from exercising jurisdiction over this litigation because it lacks jurisdiction over the subject matter of this litigation.

JURISDICTIONAL ISSUE

The Defendant urges that the Bankruptcy Reform Act of 1978 expanded the jurisdiction of the Bankruptcy Court so that it may now hear and try the same cases which are heard and tried by Federal District Court under the jurisdiction provisions of Article III of the Constitution and thus the Bankruptcy Court is therefore exercising the "judicial power" of the United States as set forth in Article III. The Defendant further urges that Congress having created a Bankruptcy Court with jurisdiction equivalent to that of the United States District Court must also give the judges of the Bankruptcy Court life tenure and a salary which may not be reduced. The

Defendant correctly points out that the judges of the new Bankruptcy Court are not life tenured. 28 U.S.C. §153(a). The Defendant, from the foregoing concludes that the Bankruptcy Reform Act of 1978 has unconstitutionally vested Article III judicial power in non tenured judges and that being so the Bankruptcy Court is barred from exercising that jurisdiction and, absent such power, this Bankruptcy Court has no jurisdiction over the subject matter of this litigation and the complaint should therefore be dismissed.

The Plaintiff on the other hand sees the issue to be whether the judicial powers under Article III of the Constitution may be bestowed upon Article I Courts and concludes citing *Palmore vs. United States*, 411 US 389 (1973) that Congress can grant judicial powers to Article I courts and in the Bankruptcy Reform Act of 1978 has done so, creating a new Article I court of record to be known as the United States Bankruptcy Court.

The United States position set forth in its brief is that "The changes effected by the Reform Act reflect nothing more than a revision in accordance with prior practice in the Bankruptcy Court." The United States notes a significant change from the practice in effect prior to the adoption of the Reform Act and calls it constitutionally irrelevant as being only the expressed intention of Congress to remove the consent of the defendant as a precondition for the exercise of jurisdiction by the Bankruptcy Court. The United States asserts that the jurisdiction of Bankruptcy Courts is derived from Congressional powers under Article I and not from the grant of judicial power under Article III of the Constitution and adjudication of controversies in Bankruptcy proceedings is an exercise of Congress' plenary power over the law of bankruptcy under Article I and not at all the exercise of the judicial power

of the United States under Article III. *United States v. Raddatz*, — U.S. —, 100 S Court 2406 (1980), *United States v. Kras*, 409 U.S. 434 (1973).

Section 201(a) of Title II of the Bankruptcy Reform Act of 1978, 28 U.S.C. §151, created a new court of record known as the United States Bankruptcy Court. This legislation provides that there shall be a bankruptcy court in each judicial district which will be an "adjunct to the district court for such district." 28 U.S.C. § 151(a). It was further provided that such "bankruptcy court shall consist of the bankruptcy judge or judges for the district". 28 U.S.C. § 151(b). These judges who collectively constitute the new bankruptcy court are to be appointed by the President with the advice and consent of the Senate.

The Jurisdiction of the bankruptcy court is provided in 28 U.S.C. § 1471. The court is given "original and exclusive jurisdiction over all cases under title 11" § 1471(a), and "original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11", § 1471(b). Further, the bankruptcy court in any given district "shall exercise all of the jurisdiction conferred by § 1471 . . . on the district courts." § 1471(c).

This grant of jurisdiction, most notably § 1471(b), is a substantial enlargement of the jurisdiction of the former bankruptcy courts. This fact was noted in the House Report to the legislation which ultimately became § 1471(b).

> "Subsection (b) is a significant change from current law. It grants the bankruptcy court original (trial), but not exclusive, jurisdiction of all civil proceedings under title 11 or arising under or related to cases under title 11. This is the broadest grant of jurisdiction to dispose of proceedings that arise in bankruptcy cases or under the bank-

ruptcy code. Actions that formerly had to be tried in State court or in Federal district court, at great cost and delay to the estate, may now be tried in the bankruptcy courts." H.R.Rep. No. 595, 95th Congress, 1st Session, 445 (1977).

Based on the references to legislative history provided in the filed briefs it is clear that Congress did create a new court, the Bankruptcy Court as an Article I Court, and when it did so it was fully apprised of the constitutional considerations posed by Article I and Article III of the United States Constitution. Congress determined that it preferred and had the power to utilize a court staffed by judges without lifetime tenure and created a court with attendant judgeships with service terms of fourteen years.

All Acts of Congress are presumed to be constitutional. Resolving every doubt in favor of constitutionality and indulging in a strong presumption of constitutionality, as this Court must, the only conclusion this Court may reach is the Congressional grant of power and jurisdiction made to the Bankruptcy Court in the Bankruptcy Reform Act of 1978 is proper and constitutional. This Court does have jurisdiction to hear and determine the plaintiff's claim now pending in the adversary proceeding before the Court.

DISMISSAL BY REASON OF ANOTHER PENDING ACTION

Alternatively Marathon moved the Court for an order dismissing this proceeding on the grounds that there is a lawsuit pending against Marathon instituted by Northern in the United States District Court for the Western District of Kentucky arising out of the same cause of action being asserted in these proceedings and Northern is barred from instituting these proceedings having failed to pursue its right of re-

moval within the time limit specified under Rule 7004 of the Interim Bankruptcy Rules adopted by this Court.

The action by Northern against Marathon in the Western District of Kentucky was commenced some time before the filing of the Debtor's Chapter 11 proceedings on January 14, 1980, and is still pending. Marathon asserted a counter claim in that action which is affected by the automatic stay provisions of the Bankruptcy Code. The stay provisions of 11 U.S.C. §362 and Rule 401 of the Bankruptcy Rules reach claims asserted against but not claims asserted by the debtor.

A pending action will not abate because of the filing of a bankruptcy petition by the plaintiff, nor is the pendency of an action in one court a bar to a subsequent action for the same relief. A litigant has a right to have his action tried wherever he can find venue.

Since this action was commenced in the United States District Court, Western District of Kentucky, Northern's financial condition has deteriorated substantially. The commencement of this proceeding in Minnesota Bankruptcy Court was a calculated move made by the Debtor for its convenience as dictated by its financial condition. The Bankruptcy Code contemplates that this may be done. Section 1478 of the Bankruptcy Code is not a bar to pursuing a pending claim other than by exercising the removal mechanisms of Section 1478. The removal provisions of Section 1478 provide one way to get an action pending in another court before the Bankruptcy Court—it is not an exclusive avenue—Northern has achieved its desire to litigate this case in its home district by commencing a new action in the Bankruptcy Court in the district where it filed its original petition. This alternative is permissible under the new Bankruptcy Code.

ABSTENTION FROM A PROPER EXERCISE OF JURISDICTION

Defendant urges that the Court should refrain from exercising jurisdiction, deferring in the interest of justice to the District Court for the Western District of Kentucky. The Court Northern originally selected is a proper forum for the litigation of the type of claim here involved. Marathon asserts that the Court in Western District of Kentucky is the only forum in which full relief can be afforded the parties because of the foreclosure of a mechanics lien asked for in that original action and thus this Court cannot afford full relief to the parties because Northern in order to foreclose its lien would have to do so in a Kentucky Court.

The Bankruptcy Code authorizes abstention "in the interest of justice." The existence of the mechanics lien claim pending in Kentucky would in no way cause difficulty to a resolution of the basic claims in the Minnesota Court. This matter may be fully adjudicated here and if necessary Northern could then proceed to Kentucky to foreclose its lien. The litigation in the Western District of Kentucky has not ripened to the extent that that is the one case to proceed with out of the two cases that are now pending one in Kentucky and one in Minnesota. Of consideration to the Court is the financial condition of Northern. To require it to litigate this claim in Western District of Kentucky would impose an additional hardship on a company that is not now in a normal operating posture. It is in financial difficulties and this Court is satisfied that venue of this action has been properly laid in this Bankruptcy Court in Minnesota. The Defendant has failed to make a showing which would require this Court to abstain.

TRANSFER OF THIS ACTION

Marathon's final argument is that in the event that the Court does not dismiss the action, nor abstain from exercising jurisdiction, venue should be transferred to the Bankruptcy Court of the Western District of Kentucky pursuant to §1475 of the Bankruptcy Code. This Court, once having accepted jurisdiction of the litigation should proceed with caution of any request to transfer the litigation from this District to another District. Marathon asserts that it is in the interest of justice and convenience of all the parties to require that this action be transferred to the Bankruptcy Court of the United States District Court for the District of Kentucky pursuant to 28 U.S.C. §1475. The dispute presented in this litigation arose out of the construction of facilities located in Jefferson County, Kentucky. Northern voluntarily venued its original suit in that District where it did business under the contract between the parties. Proceedings in Kentucky are not necessarily more convenient and inexpensive as those terms are understood by §1475 of the Bankruptcy Code and 28 U.S.C. §1404(a).

One of the factors to be examined in determining the "the convenience of the parties" is the relative economic ability of the litigants to bear the expense of trial in a particular forum. Northern is a corporation with its principle place of business in Minnesota and presently has no operations in the state of Kentucky. Marathon is a national corporation which is licensed to do business in Minnesota. The cost to Northern, presently a debtor in a Chapter 11 proceedings through reorganization, would necessarily be greater in Kentucky than in Minnesota. The average cost of travel and transportation of witnesses residing in this state which would be necessitated by further proceedings in Kentucky must be considered.

Weighing the relative expense and inconvenience between the parties, the Court is satisfied that the interest of justice favor keeping this case in Minnesota. ACCORDINGLY, IT IS ORDERED that the Defendant Marathon motion to dismiss this action for lack of jurisdiction on the grounds that the exercise of jurisdiction herein by the Bankruptcy Court is an unconstitutional exercise of the jurisdictional power granted solely to the Courts of the United States under Article III, Section 1 of the United States Constitution be and the same is hereby denied.

IT IS FURTHER ORDERED that in all other respects, the motion to dismiss this proceedings on the grounds that there is a lawsuit pending against the Defendant in the United States District Court for the District of Kentucky arising out of the same cause of action, or in the alternative to abstain from hearing this matter in the interest of justice and alternatively to transfer the proceedings to the Bankruptcy Court of the United States District Court for the Western District of Kentucky in the interest of justice and the convenience of parties be and the same are hereby denied.

Dated and entered this 17th day of November, 1980.

JOHN J. CONNELLY
U. S. Bankruptcy Judge

APPENDIX C
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-80-589

MARATHON PIPELINE COMPANY,
Petitioner,

vs.

NORTHERN PIPELINE CONSTRUCTION CO.,
Respondent.

NOTICE OF APPEAL TO THE
UNITED STATES SUPREME COURT

The United States of America hereby appeals to the Supreme Court of the United States pursuant to 28 U.S.C. §§ 1252 and 2101(a), from the judgment of this Court entered on April 23, 1981.

Dated: May 19, 1981.

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APPENDIX D
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil 4-80-589

MARATHON PIPELINE COMPANY,

Petitioner,

vs.

NORTHERN PIPELINE CONSTRUCTION CO.,

Respondent.

NOTICE OF APPEAL

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §2101 and §1252, Respondent Northern Pipeline Construction Co. hereby appeals the Order of the Honorable Miles W. Lord, dated April 23, 1981 in this matter to the United States Supreme Court.

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FILED
DEC 29 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-546

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,
Appellant

v.

MARATHON PIPELINE CO.

and

NORTHERN PIPELINE CONSTRUCTION CO.

No. 81-150

NORTHERN PIPELINE CONSTRUCTION CO.,
Appellant

v.

MARATHON PIPELINE CO.

and

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

JOINT APPENDIX

JURISDICTIONAL STATEMENTS FILED JULY 17, 1981 AND
SEPTEMBER 16, 1981

PROBABLE JURISDICTION ENDED NOVEMBER 9, 1981

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RELEVANT DOCKET ENTRIES

Date	Nr.	Bankruptcy Proceeding Record
3-25-80		Complaint of Northern Pipeline Construction Co., Debtor, vs. Marathon Pipeline, Co. This is an action to enforce claims for money due under written contracts; to recover damages for breach of warranty and misrepresentation, etc. (see complaint)
3-25-80		Issued Summons and Notice of Pre-Trial, filed. Hearing: *May 7, 1980 at 10:00 a.m. in St. Paul.*
4- 1-80		Affidavit of Service re Summons and Notice of Pre-Trial, filed.
4-22-80		Stipulation extending time to answer, file motions or otherwise appear to *May 12, 1980* and continuing Pre-Trial to *May 22, 1980 at 10:00 a.m. in St. Paul,* filed.
4-22-80		Order approving Stipulation, filed.
5-12-80		Notice of Motion and Motion of Defendant, Marathon Pipeline Company to Dismiss or Alternatively to Abstain or Transfer the Proceeding to the Bankruptcy Court of the United States District Court for the Western District of Kentucky, filed.
		Hearing: *May 22, 1980 at 10:00 a.m. in St. Paul*
5-12-80		Affidavit of Richard G. Stein in support of Motion to Dismiss, filed.
5-14-80		Affidavit of Service re Notice of Motion, Motion and Affidavit of Richard G. Stein, filed.
5-14-80		Section of Exhibit D to the Affidavit of Richard G. Stein which was inadvertently omitted with affidavit of service, filed.

Date	Nr.	Bankruptcy Proceeding Record
5-20-80		Hearing on Motion to Dismiss, etc. removed from calendar per request of atty. Robert Atmore.
5-22-80		Memorandum of Defendant, received.
5-22-80		Pre-Trial hearing came on as scheduled. Hearing on Motion set for *June 23, 1980* at 10 a.m.
6-19-80		Memorandum of Plaintiff, received.
6-19-80		Affidavit of John L. Devney, filed.
6-19-80		Affidavit of Vance Norgaard, filed.
6-20-80		Hearing on Motion came on as scheduled. Matter to be taken under advisement. Proceedings recorded.
9- 9-80		Intervening Brief of the United States, filed.
9- 9-80		Motion of The United States of America to Intervene, filed.
9-10-80		Order granting motion to Intervene, filed. Certificate of Mailing, filed.
11-17-80		Memorandum and Order, filed. (this is incorrect and it was sent to all interested parties. A new Memorandum and Order to be filed.)
11-17-80		Memorandum and Order, filed. Certificate of Mailing, filed.
11-28-80		Application for Leave to Appeal filed with the U.S. District Court. (copy in our
3-27-81		Certified copy of Judge Miles Lord's Order granting leave to appeal, filed.
4-27-81		Copy of Order of Judge Miles Lord of April 23, 1981, filed.
11-28-80	1	APPLICATION FOR LEAVE TO APPEAL. Assigned to Judge, #761, Vol. IV on the Master Civil.

Date	Nr.	Bankruptcy Proceeding Record
3- 6-81	2	ORDER (Lord, J) that the request of Marathon Pipeline for leave to appeal the jurisdictional decision of Bankruptcy Referee Connelly is denied; the matter can be raised on appeal after the issuance of a final order from the Bankruptcy Court dated: 3-5-81
	3	NOTICE TO COUNSEL
3-10-81	4	ORDER (Lord, J) that this Court's Order of March 5, 1981, be amended by striking the word "Referee" on page 1, line 6 and page 2, line 16 and inserting the word "Judge" in both places.
	5	NOTICE TO COUNSEL.
3-16-81	6	NOTICE AND MOTION OF PLTF. FOR RECONSIDERATION OF THE ORDER OF THIS COURT DATED 3-5-81, ret. 3-26-81 at 10:00 A.M.
3-26-81	7	MINUTES OF PROCEEDINGS (Lord, J) (Rafel, R) re: pltf's motion for reconsideration of the order of this court dated 3-5-81—Granted. Judge will issue an Order in a few days without any further briefs.
	8	ORDER (Lord, J) that the request of Marathon Pipeline for leave to appeal the jurisdictional decision of Bankruptcy Judge Connelly is granted. 28 U.S.C. § 1334(b).
	9	NOTICE TO COUNSEL.
4-23-81	10	ORDER (Lord, J) that the adversary proceeding instituted by Northern Pipeline Construction Co. against Marathon Pipeline pursuant to the provisions of the Bankruptcy Code is dismissed. It Is Further Ordered That a stay of the provisions of this Order is granted pending appeal.

Date	Nr.	Proceedings
	11	JUDGMENT That the adversary proceeding instituted by Northern Pipeline Construction Co. against Marathon Pipeline pursuant to the provisions of the Bankruptcy Code is dismissed.
	12	NOTICE TO COUNSEL.
5-19-81	13	UNITED STATES OF AMERICAN'S APPEAL TO THE U.S. SUPREME COURT FROM THE JUDGMENT ENTERED ON 4-23-81. Mailed certified copy of Notice, along with 2 certified copies of docket entries to Alexander Stevas, Clerk, U.S. Supreme Court, 1 First St. NE, Washington, D.C. 20543.
5-20-80	14	NORTHERN PIPELINE CONSTRUCTION CO.'S NOTICE OF APPEAL TO THE U.S. SUPREME COURT FROM THE ORDER ENTERED ON 4-23-81. Mailed certified copy of Notice, along with 2 certified copies of docket entries to Alexander Stevas, Clerk, U.S. Supreme Court, 1 First St. NE, Washington, D.C. 20543.
7- 9-81		REPORTER'S NOTES, Re: Motion on 3-26-81 in Mpls Box R-81-9 (Rafel-R).
7-27-81	15	MEMORANDUM (Lord, J) re: Findings of Fact and Conclusions of Law for Order of 4-23-81. (Dated 7-24-81).
	16	NOTICE TO COUNSEL.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Proceedings for a Reorganization Under Chapter 11

Case No. 3-80-66

ADVERSARY PROCEEDING NUMBER 800042

In the Matter of:

NORTHERN PIPELINE CONSTRUCTION CO., DEBTOR

NORTHERN PIPELINE CONSTRUCTION CO., PLAINTIFF

vs.

MARATHON PIPELINE COMPANY, DEFENDANT

All documents regarding this matter must be identified by *both* adversary and bankruptcy case numbers.

COMPLAINT

Plaintiff and Debtor, Northern Pipeline Construction Co., by counsel, and for its Complaint, states as follows:

THE PARTIES

1. Plaintiff Northern Pipeline Construction Co. (hereinafter referred to as "Northern") was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota with its principal place of business at 1800 West Highway 13, Burnsville, Minnesota. Northern was and now is engaged in the business of constructing oil and gas pipelines and at all

pertinent times hereto was duly authorized to do business in the State of Kentucky.

2. Defendant Marathon Pipeline Company (hereinafter referred to as "Marathon") was and now is a corporation duly organized and existing under the laws of the State of Delaware with principal places of business in Findlay, Ohio and Martinsville, Illinois. Marathon, among other things, is engaged in the business of owning and operating petroleum products, pipelines and related facilities.

THE CLAIMS

3. This is an action to enforce claims for moneys due and owing under written contracts, to recover damages for breaches of contract and warranty, misrepresentations and economic coercion and duress, to recover compensation for changes, extras and additional work either as authorized changes to the contract, modifications of the contract, or upon *quantum meruit*, and to recover consequential damages.

JURISDICTION

4. Federal jurisdiction is based upon 28 U.S.C. § 1471.

FIRST CLAIM FOR RELIEF

(*Breach of Contract and Warranty—Misrepresentation*)

5. During September 1977, Marathon invited construction bids for construction of approximately 2.0 miles of two twelve-inch pipelines to Texaco Company's Louisville terminal, with one twelve-inch pipeline extending 1.4 more miles to Louisville Refining Company's refinery and approximately 6.0 miles of a sixteen-inch pipeline to Sun Oil Company's terminal (hereinafter referred to as the "Project"). Contract plans and specifications were submitted by Marathon to Northern during September, 1977, for the purpose of enabling and inducing Northern to:

(a) Submit a bid for the contract work;
(b) Execute the contract work;

(c) Undertake the performance of the contract work; and

(d) Perform the contract work.

6. As part of the invitation for bids and as part of the plans and specifications submitted by Marathon to Northern, Marathon warranted, represented and agreed that:

(a) The plans and specifications and other proposal data were competently and accurately prepared.

(b) The plans and specifications and other proposal data were in all things adequate, sufficient and proper for use in the construction of the Project under the conditions to be encountered at the work site.

(c) Each item of information disclosed in the proposal data and plans and specifications was sufficiently accurate and complete to enable Northern to compute accurately the cost to Northern of the construction of the Project, to compute a reasonable profit therefor and compute the total amount of Northern's bid.

(d) The site conditions and contract requirements were such as would permit Northern to complete successfully all of the contract work in accordance with the plans and specifications and with the expenditure of time indicated and specified for the completion of the work.

(e) The plans and specifications provided in all things sound and feasible components and directions for completion of the contract under site conditions.

(f) Changes in the work and in the design of the work would be made only upon prior notice to Northern and such changes would be accomplished in timely fashion by giving written change orders or supplemental agreements.

(g) Marathon would give Northern prompt equitable time adjustment by time extension and price increases for changes in the work or in the design of the work or for changed conditions and extra work involved in the project work and testing and that changes would be

promptly issued and would contain adequate and suitable directions for completing the contract work.

(h) Marathon would give Northern a prompt notice to proceed with construction, together with prompt issuance of contract documents and Northern would be permitted to continue its work throughout the construction without interruption, disruption or delay of or interference with their planned schedules and sequence of the work.

(i) Inspections by Marathon would be competently, fairly and promptly made and that additional compensation would be paid where ..... (illegible) ..... in design or deficient owner-supplied materials.

(j) Marathon would, in good faith and in a timely fashion, stake, supervise, administer, coordinate and facilitate performance of the contract without hindering, interfering with, delaying, deceiving or dominating Northern.

(k) Marathon-supplied materials would be sound, suitable and fit for intended use without the need for repair by Northern.

7. Northern reasonably relied upon the aforesaid warranties and representations and Northern was induced thereby to submit the bid to Marathon to enter into the contract and to undertake performance thereof. Northern submitted a bid in an amount sufficient to compensate Northern for the cost of the construction as said cost was made to appear by Marathon from the plans and specifications, together with a reasonable profit for the performance of the contract work. Upon award by Marathon, Northern and Marathon entered into a contract dated October 6, 1977 for the project work; however, Northern did not receive an executed contract until on or about October 24, 1977.

8. Northern has completed all of its obligations under its contract with Marathon.

9. Marathon breached all of the aforesaid warranties and agreements and made misrepresentations in that, among other things:

(a) The plans and specifications and other proposal data were not completely and accurately prepared but were in truth and in fact incomplete, deficient, inadequate and insufficient.

(b) The plans and specifications and other proposal data were insufficient and unsuitable for use in the construction of the Project.

(c) The information disclosed in the proposal, plans and specifications was not sufficiently accurate and complete to enable Northern to compute accurately the cost to Northern of the construction of the Project and, thus, was not suitable for the computation of its bid.

(d) The site conditions and contract requirements were not such as would permit Northern to successfully complete its contract in accordance with the plans and specifications and with the expenditure of time indicated and specified for completion of the project.

(e) The plans and specifications did not provide in all things sound and feasible components and directions for completion of the contract under the site conditions.

(f) Changes in the contract and design were made without prior notice to Northern and were not the subject of timely written change order or supplemental agreement.

(g) Marathon did not give Northern prompt and equitable adjustment by time extension and price increases for changes, changed conditions and extra work, nor were change orders promptly issued.

(h) Northern was not permitted to continue its work without interruption, disruption or delay of or interference with its planned schedule and sequence of the work.

(i) Inspections were not competently, fairly and promptly made, nor was additional compensation paid where extra cost was necessitated by errors in design or deficient owner-supplied materials.

(j) Marathon did not, in good faith and in a timely fashion, stake, supervise, coordinate and facilitate the performance of the contract work without hindering, interfering with, delaying, deceiving or dominating Northern.

(k) Marathon-supplied materials were not sound, suitable and fit for their intended use without extensive repairs by Northern.

10. As a result of Marathon's breaches of warranty and agreements and misrepresentations, Northern has suffered damages in an amount presently estimated to be $1,474,602.44.

SECOND CLAIM FOR RELIEF

(Acceleration)

11. Realleges and incorporates by reference herein all of the foregoing paragraphs as if specifically stated.

12. After Northern's bid and receipt of Marathon's notice of intent to award, Marathon unilaterally advanced the completion date of the project in breach of its warranties, representations and agreements, thereby wrongfully accelerating Northern's performance.

13. Northern attempted to comply with Marathon's demand for the accelerated completion date and staffed the Project with men and equipment far in excess of those anticipated at the time of its bid.

14. Almost immediately after commencement of construction, weather conditions occurred at the job site, including but not limited to heavy rains far beyond the average precipitation for said time period, together with snow accumulations in excess of the 100-year average.

15. Northern was confronted with such severe weather, water, soil and other conditions affecting substantially all of the Project which, when coupled with Marathon's wrongful order to accelerate the completion date and refusal to grant time extensions, resulted in damages arising from significantly enlarged numbers of

laborers and equipment either standing idle at the job site waiting for site conditions to improve or working at rates of productivity far below those anticipated at the time of the bid.

16. As a result of Marathon's wrongful orders to accelerate and its refusal to grant time extensions under the site conditions previously described, Northern was forced to perform substantial portions of the work under unanticipated winter conditions and changed conditions.

17. As a result of Marathon's breach of wrongful acceleration of the contract and refusal to grant time extensions in light of site conditions, Northern has suffered damages in an amount presently estimated to be $1,474,602.44.

THIRD CLAIM FOR RELIEF

(*Force Majeure*)

18. Realleges and incorporates by reference herein all of the foregoing paragraphs as if specifically stated.

19. The contract provides with respect to "general conditions, force majeure":

> Neither contractor nor company shall be under obligations or subject to any liability for failure to carry out respectively the terms and provisions of this contract, during the time and to the extent, that such failure be due solely to force majeure. The party affected by such force majeure must give notice and full particulars of the force majeure in writing or by telegram, to the other party as soon as possible after the occurrence of the cause relied on. The obligation of the party giving such notice of force majeure shall be so suspended during the continuance of any inability so caused. Such inability shall not be a breach of this contract and the same party shall not be liable for damages or otherwise on account thereof, provided notice as herein set forth is given.

The term "force majeure," as used herein, shall mean acts of God, earthquakes, fire, flood, malicious mischief, insurrection, riot, strikes, lockouts, breakouts, picketing, labor disturbances, public enemy, war (declared or undeclared), landslides, washouts, explosions, epidemics, compliance with any federal, state or municipal laws, or with any regulation, order, rule, recommendation, request (including but not limited to priority, rationing or allocation orders or regulations) of any governmental agencies or authorities or representatives of any government (foreign or domestic) acting under claim or color of authority, failure to obtain permits required by federal, state or municipal law, inability of company to obtain materials or rights of way, total or partial failure or loss or shortage of all or any part of transportation facilities ordinarily available to and used by a party hereto in the performance of obligations imposed by this agreement, or any cause whatsoever beyond the reasonable control of either party hereto, whether similar to or dissimilar from the causes herein enumerated.

It is, however, expressly agreed that time is of the essence to this contract and that every reasonable effort will be made by the company and the contractor to avoid delay or suspension of any of the work to be performed hereunder. The contractor expressly agrees to make every reasonable effort, to the satisfaction of the company, to avert or settle any strikes or other labor difficulties which may be threatened by or occur among its employees, the employees of any subcontractors or third parties.

20. Immediately after commencement of the project work, Northern was confronted with such severe weather, water, soil and other conditions affecting substantially all of the Project as to constitute "force majeure."

21. Northern notified Marathon of the existence of the force majeure condition but Marathon wrongfully

refused to permit Northern to suspend the work but ordered Northern under wrongful threat of termination to proceed in the face of force majeure conditions at enormous cost to Northern and only after a substantial period of time had passed did Marathon acknowledge the existence of force majeure conditions and permit a suspension of the work. However, upon resumption of the work, Marathon again forced Northern to work under force majeure conditions.

22. As a result of Marathon's wrongful refusal to permit suspension of the work, Northern was forced to perform under unanticipated winter conditions and changed conditions, all of which continued after resumption of the work following suspension.

23. As a result of Marathon's wrongful refusal to acknowledge the existence of force majeure conditions, Northern suffered damages in an amount presently estimated to be $1,474,602.44.

FOURTH CLAIM FOR RELIEF

(*Change Orders*)

24. Realleges and incorporates by reference herein all of the foregoing paragraphs as though specifically stated.

25. The actions and orders by Marathon requiring Northern to continue performance of the contract work during the period when Northern was authorized to suspend work due to conditions beyond its control constitute either actual or constructive change orders which entitled Northern to payment of all extra costs and extensions of time resulting from performance in accordance with such change orders.

26. Marathon has wrongfully refused to acknowledge the actual or constructive change orders and has failed to pay Northern for its extra costs arising out of such changes. As a result, Northern has suffered damages in an amount presently estimated to be $1,474,602.44.

FIFTH CLAIM FOR RELIEF

(Quantum Meruit)

27. Realleges and incorporates by reference herein all of the foregoing paragraphs previously stated as though specifically set forth.

28. The actions and orders by Marathon required Northern to continue performance of the work under circumstances and conditions which made performance of the contract a practical impossibility and except by expenditure of time, efforts and money far in excess of that which would have been required under the contract conditions reasonably understood and anticipated. As a result, Northern is entitled to be compensated for the fair and reasonable value of such extra work and expense in an amount presently estimated to be $1,474,602.44.

SIXTH CLAIM FOR RELIEF

(Economic Coercion and Duress)

29. Realleges all of the allegations set forth in the foregoing paragraphs as though specifically stated.

30. The custom and practice in the private pipeline construction industry is that jobs such as this Project are made available to contractors for bid by invitation of the owner only.

31. In addition to the wrongful refusals to permit Northern to suspend operation and the wrongful orders to accelerate and increase manpower and equipment on the Project site, Marathon also threatened to blacklist Northern and remove it from future bidding lists in the industry unless it continued to increase manpower and equipment on the site and continued working under the force majeure and unanticipated and changed conditions.

32. Further, Marathon wrongfully threatened termination of the contract which would have damaged Northern's competitive standing and reputation in the industry.

33. That as a result of Marathon's wrongful threats, coercion and duress, Northern was forced to perform work under unanticipated winter conditions and force majeure changed conditions which resulted in damages to Northern in an amount presently estimated to be $1,474,602.44.

SEVENTH CLAIM FOR RELIEF

(Modification of Contract)

34. Realleges all of the allegations heretofore set forth as if specifically stated herein.

35. From the beginning of construction of the Project until its completion, Marathon repeatedly demanded that Northern continue performance in the face of winter conditions, force majeure and changed conditions, knowing full well that Northern's continued performance required substantially increased costs of doing the work. Marathon further indicated at the time of its repeated work demand that consideration of additional compensation for Northern's substantially increased costs would be deferred until the construction was completed.

36. Northern relied upon Marathon's continued assertions that should Northern continue to work on the job, the issue of additional compensation would be resolved at a later time and further understood that the contract provisions relative to compensation for extra work and changed conditions had been waived or modified.

37. Upon completion of the Project work, Marathon has refused to provide Northern with additional compensation, contrary to the modified contract and in breach of its warranties and representations. As a result of Marathon's breach of the modified agreement and its misrepresentations, Northern has suffered damages in an amount presently estimated to be $1,474,602.44, which Marathon is estopped from denying payment of as due and owing.

EIGHTH CLAIM FOR RELIEF

(Consequential Damages)

38. Realleges and incorporates by reference herein all of the foregoing paragraphs as though specifically stated.

39. As a result of Marathon's refusal and failure to perform under the contract and as a result of Marathon's breach thereof, Northern has sustained both general and special damages including, but not limited to, all extra costs, expenses and interest on the sums claimed in Claims One through Seven above, but also losses occasioned by the forced pledging and sale of certain property and other adverse financial consequences caused by wrongful acts of Marathon, plus other general and special damages, all to Northern's damage in an amount presently estimated to be $1,000,000. Marathon's wrongful acts have included, but are not limited to, the following:

(a) Wrongful denial of an agreed contract remedy by refusal to allow suspension of operations under the "force majeure" provisions of the contract;

(b) Failure and refusal to grant appropriate time extensions for the performance of the contract.

(c) Failure and refusal to pay money due and owing under the contract in a timely fashion;

(d) Failure and refusal to approve and pay moneys due and owing for extra work and changed conditions;

(e) Wrongful assumption of management of the work, mismanagement of the same and interference with Northern's progress as follows:

(1) Acceleration orders.

(2) Inteference by Marathon with sequence of work.

(3) Failure by Marathon to perform its services in a timely fashion under the contract.

(4) Hypertechnical, erroneous and untimely inspections.

(5) Demoralization of Northern's crews.

(f) Other breaches not hereinabove specified in detail.

40. For such other, further and proper relief to which Northern may be entitled.

Dated this 24th day of March, 1980.

BRIGGS AND MORGAN

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SUPREME COURT OF THE UNITED STATES

No. 81-150

NORTHERN PIPELINE CONSTRUCTION CO., APPELLANT

v.

MARATHON PIPE LINE COMPANY and UNITED STATES

Appeal from the United States District Court
for the District of Minnesota

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted. The case is consolidated with case No. 81-546, *United States* v. *Marathon Pipe Line Co., et al.*, and a total of one hour is allotted for oral argument.

November 9, 1981

SUPREME COURT OF THE UNITED STATES

No. 81-546

UNITED STATES, APPELLANT

v.

MARATHON PIPE LINE CO., ET AL.

Appeal from the United States District Court
for the District of Minnesota

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted. The case is consolidated with case No. 81-150, *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Company and United States*, and a total of one hour is allotted for oral argument.

November 9, 1981

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Nos. 81-150, 81-546

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NORTHERN PIPELINE CONSTRUCTION CO.,
Appellant,

vs.

MARATHON PIPE LINE COMPANY and
UNITED STATES OF AMERICA.
Appellees,

UNITED STATES OF AMERICA,
Appellant,

vs.

MARATHON PIPE LINE COMPANY and
NORTHERN PIPELINE CONSTRUCTION CO.
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Nos. 81-150, 81-546

NORTHERN PIPELINE CONSTRUCTION CO.,
Appellant,

vs.

MARATHON PIPE LINE COMPANY,
and UNITED STATES OF AMERICA.
Appellees.

UNITED STATES OF AMERICA,
Appellant,

vs.

MARATHON PIPE LINE COMPANY,
and NORTHERN PIPELINE CONSTRUCTION CO.,
Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF MINNESOTA

MOTION TO AFFIRM

Opinions Below

The order and memorandum of the District Court are reported at 12 Bank.Reptr. 946, and appear as Appendix B to the Government's Jurisdictional Statement (p. la-26a). The opinion of the Bankruptcy Court (Gov't. J.S.App.C., 27a-36a) is reported at 6 Bank.Rptr. 928.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Article I, Section 8, Clause 4 of the United States Constitution provides:

> The Congress shall have Power . . .
>
> To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

2. Article III, Section 1 of the United States Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their services, a Compensation, which shall not be diminished during their Continuance in Office.

3. Article III, Section 2, Clause 1 of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases

affecting Ambassadors, other public Ministers and Consuls;—to all cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between citizens of the same State claiming Lands under Grants of different States. and between a State or the Citizens thereof, and foreign States, Citizens or Subjects.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Bankruptcy Reform Act of 1978, Pub. L. 95-598, Title II, §201-252, and Title IV, §401-411, 92 Stat. 2657-2673, 2682-2688, are reproduced in the Appendix, *infra*, 1a-15a.

STATEMENT

1. These are direct appeals, pursuant to 28 U.S.C. §1252, from a decision of the United States District Court for the District of Minnesota dismissing an adversary proceeding instituted in the United States Bankruptcy Court for the District of Minnesota by Northern Pipeline Construction Company (hereinafter "Northern") against Marathon Pipe Line Company (hereinafter "Marathon") on the ground that the delegation of expanded jurisdiction over plenary matters to non-tenured bankruptcy judges pursuant to 28 U.S.C. §1471, violates Article III of the United States Constitution.

On March 8, 1979, Northern instituted a lawsuit against appellee, Marathon, under 28 U.S.C. §1332, in the United States District Court for the Western District of Kentucky for claims arising out of a contract between

the parties involving construction of a pipeline in Kentucky. On January 14, 1980, Northern filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court, District of Minnesota. Several months after petitioning for reorganization, Northern attempted to initiate an adversary proceeding under the Bankruptcy Code by filing and serving a Complaint against Marathon asserting the same contract claims asserted in the lawsuit then pending in the Western District of Kentucky, with the exception of a claim for mechanic's lien relief. Marathon moved the Bankruptcy Court for dismissal of Northern's Complaint for lack of jurisdiction. The Bankruptcy Court denied the motion and Marathon appealed to the District Court pursuant to Reform Act, Title IV, Section 404(c). On April 23, 1981, the District Court entered an order dismissing Northern's adversary proceeding against Marathon because "the delegation of authority in 28 U.S.C. §1471 to the Bankruptcy Judges to try cases which are otherwise relegated under the Constitution to Article III Judges is an unconstitutional delegation of authority." *Marathon Pipe Line Company v. Northern Pipeline Construction Co.*, 12 Bank.Rptr. 946, 947 (D. Minn. 1981) (Gov't.J.S.App. 1a-2a). Both the United States, which had intervened because of the challenge to the constitutionality of a federal statute, and Northern filed notices of appeal to this Court. Northern docketed its appeal, No. 81-150, on July 17, 1981. The United States' appeal, No. 81-546, was docketed on September 16, 1981, and its Jurisdictional Statement was received by Marathon's counsel on September 18, 1981.

2. In enacting the Bankruptcy Reform Act of 1978 (hereinafter "Reform Act"), Congress radically altered

the judicial administration of bankruptcy in the United States. Prior to the enactment of the Reform Act, jurisdiction over bankruptcies was vested in and exercised by the United States district courts (former 11 U.S.C. §1(10)). Under the former Bankruptcy Act, a party like Marathon who was sued in federal court by a bankrupt's trustee in a plenary proceeding had a vested right at all times to have the case tried before an Article III judge. Former 11 U.S.C. §46. Although the old Bankruptcy Act provided that summary proceedings involving a bankrupt's property in actual or constructive possession of the court could be handled by bankruptcy referees, jurisdiction even in these matters was at all times vested in the district court which retained control of all proceedings. Referees were granted limited powers "subject always to review" by an Article III district judge. Former 11 U.S.C. §66.[1] More importantly, the district judge could, "at any time for the convenience of parties or other cause," withdraw a case in whole or in part from a referee and either act himself or assign the case, or part thereof, to another referee in the district. Bankruptcy Rule 102(b).

The Reform Act creates new independent bankruptcy courts of record, the "United States Bankruptcy Court for the district." (hereinafter "Bankruptcy Court[s]"), 28 U.S.C. §151(a); Reform Act Title II, §213, 92 Stat. 2661 [to be codified at 28 U.S.C. §451]. Pursuant to Section 241(a) of the Reform Act, original and exclusive jurisdiction of all cases under Title 11 of the United States Code

[1]Bankruptcy General Order 47 allowed the district court judge on review to re-examine the record and take additional evidence. In 1973, General Order 47 was superseded by Rules 810 and 752 of the Rules of Bankruptcy Procedure, which provided for a "clearly erroneous" standard of appellate review.

and original but not exclusive jurisdiction of "all civil proceedings arising under title 11 or arising in or related to cases under title 11" is conferred initially upon the district courts, 28 U.S.C. §1471 (a)(b), but then is removed completely and transferred to the new Bankruptcy Courts. 28 U.S.C. §1471(c). Since the district courts are divested of all of the bankruptcy jurisdiction conferred on them, district court judges may no longer withdraw a case in whole or in part from non-Article III bankruptcy judges.

The Bankruptcy Courts will come into existence on April 1, 1984. The existing "courts of bankruptcy" are continued during the "transition period" from October 1, 1979 to April 1, 1984, but the bankruptcy referees appointed prior to the effective date of the Reform Act are fully empowered to act as bankruptcy judges and to exercise all powers and jurisdiction which Congress purportedly conferred on the Bankruptcy Courts under the Reform Act. Reform Act, Title IV, §§404, 405, 92 Stat. 2683, 2684, Contrary to Article III judges, referees, whom the Reform Act styles "Bankruptcy Judges," were appointed by the respective district courts for a term of six years (former 11 U.S.C. §§61, 62). Referees' compensation is indexed to the Federal Salary Act, (2 U.S.C. §§351-361) which allows for diminution. Former 11 U.S.C. §68; Reform Act, Title IV §§404(d), 92 Stat. 2684. Rather than being subject to the impeachment process afforded judicial officers under the Constitution, bankruptcy "judges" may be removed throughout the transition period by the district courts "for incompetency, misconduct, or neglect of duty." Former 11 U.S.C. §62; Title IV, § 404(d), 92 Stat. 2684. In addition, referees may be removed during the transition period at the end of their six year appointed term if found

"not qualified" by the Chief Judge of the respective circuit in which they preside after consultation with a panel composed of representatives of the state and local bar associations and local law school. Reform Act, Title IV §404(b), 92 Stat. 2683.

Beginning in 1984, bankruptcy judges are to be appointed by the President, with the advice and consent of the Senate, for a term of fourteen years. 28 U.S.C. §§152, 153. As in the case of the interim "judges", bankruptcy judges' salaries will be subject to review, including diminution under the Federal Salary Act pursuant to 28 U.S.C. §154, and they will be subject to removal by the judicial councils of their respective circuits for incompetency, misconduct, neglect of duty or physical or mental disability. 28 U.S.C. §153(b).

The Reform Act purports to invest the non-Article III judges of the Bankruptcy Courts, including referees during the transition period, with "the powers of a court of equity, law and admiralty." 28 U.S.C. §1481. The bankruptcy judges are explicitly given the power to issue all writs necessary in aid of the Bankruptcy Court's expanded jurisdiction, 28 U.S.C. §1651; to hold jury trials, 28 U.S.C. §1480; issues writs of habeas corpus, 28 U.S.C. §2256; and, issue any order, process or judgment that is necessary or appropriate to carry out the provisions of Title 11. 11 U.S.C. §105(a).

The Reform Act also provides that initial appeals from decisions of the Bankruptcy Courts will be to panels of three non-Article III bankruptcy judges appointed by the Chief Judge of the respective circuit. 28 U.S.C. §160. If no such appeals panel is designated, the district court shall exercise this appellate jurisdiction. 28 U.S.C. §1334.

The court of appeals is given jurisdiction of appeals from the appellate panels and the district court. 28 U.S.C. §1293 (a). If the parties agree, a direct appeal to the court of appeals may be taken from a final judgment of a Bankruptcy Court. 28 U.S.C. §1293(b). During the transition period, in additon to the above-described methods, parties may appeal to the district court for the district in which the bankruptcy judge presides. Reform Act, Title IV, §405(c)(1)(C), 92 Stat. 2685.

Simultaneously with the removal of bankruptcy matters from the control of an Article III judge, the scope of jurisdiction of the Bankruptcy Court is greatly expanded. Bankruptcy Courts now have jurisdiction not only over all cases under Title 11, but over "all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. 1471(b). In some respects, Bankruptcy Courts, acting through non-Article III judges, are given even greater jurisdiction than that exercised by the district courts, inasmuch as Bankruptcy Courts are granted jurisdiction over any civil proceeding "related to" a case under Title 11. Bankruptcy Courts may also exercise a non-reviewable right to remove any action "arising in or related to a case under title 11" from any state or federal court. 28 U.S.C. §1478.

ARGUMENT

1. Pursuant to Rule 16 of the Rules of this Court, Appellee Marathon moves to affirm the judgment below on the ground that the District's Court's decision is so eminently correct as to warrant summary affirmance by this Court. In dismissing Northern's adversary proceeding on the ground that the attempted exercise of jurisdiction

pursuant to 28 U.S.C. §1471(b) by non-tenured bankruptcy judges violates Article III, the District Court properly applied the long established rule that a jurisdiction repugnant to the Constitution cannot be exercised by the federal courts. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

Article III of the United States Constitution requires that all judges of such inferior courts as Congress may establish "shall hold their Offices during good Behavior and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Article III does not require Congress to create inferior courts, but it does require that when Congress creates an inferior court vested with "the judicial Power of the Unted States", it must comply with the tenure and compensation requirements of Article III. The fundamental and inviolable nature of Article III's tenure and compensation guarantees, which form the cornerstone of the independence of the judicial branch of the federal government, has been repeatedly emphasized in decisions of this Court. *See, e.g., United States v. Will*, 449 U.S. 200, 66 L.Ed.2d 392, 101 S.Ct. 471 (1980); *O'Donoghue v. United States*, 289 U.S. 516, 529-534 (1933); *Evans v. Gore*, 253 U.S. 245 (1920). *See generally, The Federalist*, Nos. 78 and 79.

2. The Reform Act creates a new inferior federal court and confers on it, with two insignificant exceptions,* the full panoply of "powers of a court of equity, law, and admiralty . . ." 28 U.S.C. §1481. In creating this full scale

*The Bankruptcy Court may not enjoin another court or punish a criminal contempt not committed in the judge's presence or warranting a punishment of imprisonment. 28 U.S.C. §1481.

court, Congress failed, however, to provide the tenure and salary protections that Article III requires for all judges of inferior federal courts who exercise "the judicial Power of the United States." The "judicial Power of the United States" extends to "all cases . . . arising under . . . the laws of the United States." Article III, §2. Since the bankruptcy laws are clearly "laws of the United States," *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 610, 652 n. 3, 69 S.Ct. 1173, 1187, 1198 n. 3 (1949); *Mitchell v. Great Works Milling and Mfg. Co.*, 17 F. Cas. 497, 499 (C.C.D. Me. 1843) (Story, J.), Article III of the Constitution requires that Bankruptcy Court judges must be guaranteed life tenure and an undiminished salary. The District Court correctly concluded that the provision for non-Article III judges in the new Bankruptcy Courts satisfies neither the explicit requirements nor the underlying policies of Article III. *Accord*, Note, *Article III Limits on Article I Courts; The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 Colum.L.Rev. 560 (1980).

3. As noted by the Court below, "the affairs of insolvent men are no less diverse than the affairs of men of more substantial means." *Marathon, supra* at 954 (Gov't. J.S.App. 20a). Testimony before the House Subcommittee documents that under the Reform Act, bankruptcy judges will handle every type of civil lawsuit, including antitrust, securities, labor law, discrimination, tax, and personal injury litigation, class action litigation, and corporate reorganizations in which they must resolve disputes arising from the entire breadth of a corporation's affairs and enter final judgments which directly affect not only many in-

dividuals and corporations but whole communities. Bankruptcy Court Revision: Hearings on H.R. 8200 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 18-27 (1977) (Statement of J. Stanley Shaw). The Framers' concern that periodic terms and diminishable salary for federal judges could lead to "improper complaisance to" the executive or legislative branches or to "too great a disposition to consult popularity," *The Federalist*, No. 78, at 14, is fully applicable to "judges" exercising the expanded jurisdiction and powers of the Bankruptcy Court. As a matter of constitutional principle and as a practical matter, the independence of those federal judges who apply state, federal and constitutional law in cases and controversies related to bankruptcy proceedings is as important as the independence of any other federal judge. The House Subcommittee responsible for reporting out the bankruptcy reform bill came to the same conclusion:

> "In sum, the Constitution suggests that an independent Bankruptcy Court must be created under Article III. Article III is the constitutional norm, and the limited circumstances in which the courts have permitted departure from the requirements of Article III are not present in the bankruptcy context. Even if they were present, the text of the Constitution and the case law indicate that a court created without regard to Article III most likely could not exercise the power needed by a Bankruptcy Court to carry out its proper functions. In view of Congress' independent obligation, and the Congressional oath, to support the Constitution, the decision on this issue should not simply be thrown to the courts. Congress should establish the proposed Bankruptcy Court under Article III, with all of the protection that the

> Framers intended for an indepede it judiciary." Report Of The House Subcommittee On Civil And Constitutional Rights For The Committee Of The Judiciary, H.R. Rep. No. 95-595, 95th Cong. 1st Sess., at 33, *reprinted in* [1978] U.S. Code Cong. & Ad. News 5968 at 6000.

4. The constitutional right of a defendant sued by a bankrupt's trustee in federal court to a proceeding before an Article III judge was recognized both in the Bankruptcy Act of 1867, Act of March 2, 1867, §2, 14 Stat. 517, 518, c. 176, and the Bankruptcy Act of 1898, Act of July 1, 1898, § 23, 30 Stat. 552, c. 541 (former 11 U.S.C. §46 (b)). The Government's argument (Gov't. J.S. 10) that Article III is not violated by the creation of the new Bankruptcy Courts because plenary suits brought by a trustee (and cases asserting federally created rights) may be heard before non-tenured state court judges misapprehends the federalist structure of the United States Constitution. Mindful of King George's abuse of judicial power in the colonies, the original states in creating a federal government deemed the tenure and compensation guarantees of Article III necessary protection against such potential abuse by the federal government. The same principle is not, however, applicable to the states, since they were independently sovereign when created. Therefore, Article III, Section 1, does not, and was not intended to impose conditions on the exercise of the judicial power of the states. The Constitution does, however, guarantee an Article III judge to a litigant whose rights are to be determined in a federal court exercising the judicial power of the United States. It is precisely this constitutional right, long recognized and well established, that has been violated by enactment of the Reform Act.

5. The District Court fully reviewed and correctly rejected appellants' alternative arguments that the new Bankruptcy Court does in fact meet the requirements of Article III, or that the Bankruptcy Courts may stand as legislative or Article I courts. The Government suggests Article III problems are avoided because the courts are termed an "adjunct to" the district courts and because litigants are afforded appellate review by Article III judges. (Gov't J.S. 9). While the Bankruptcy Courts are styled "adjuncts", they do in fact operate independently of the district court and control their own dockets, 28 U.S.C. §§156, 157. Under the Reform Act, the district courts are initially vested with bankruptcy and related matter jurisdiction, 28 U.S.C. §1471(a)(b), but then are immediately divested of all such jurisdiction. 28 U.S.C. §1471(c). The Reform Act provides that "*all* of the jurisidction conferred by this section on the district courts," 28 U.S.C. §1471(c) (emphasis added), shall be exercised by the non-Article III bankruptcy judges. This statutory slight-of-hand does not save the constitutional infirmity of an untenured federal court. 2 *Collier on Bankruptcy* ¶2.01 [c] at 2-29 (15th ed.1981).

The Government also suggests that the existence of appellate review by Article III judges satisfies the requirements of Article III. (Gov't. J.S. 10). This argument implies that the tenure and salary provisions of Article III apply only to appellate judges, a suggestion completely unwarranted by the explicit language of Article III which encompasses every inferior federal court established by Congress. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 534 (1962), (no suggestion that appellate review would cure a judgment voided by an Article I judge's sitting in a

proceeding before an Article III court.) Indeed last Term, this Court in *United States v. Raddatz*, 447 U.S. 667, 65 L.Ed.2d 424 (1980) set narrow limits on the permissible delegation of functions from an Article III court to a non-Article III official. In a 5 to 4 decision, this Court held Article III requirements satisfied only where "the entire process takes place under the district court's total control and jurisdiction." 65 L.Ed.2d at 437. This Court did not rely on the existence of Article III appellate review, but on the fact that the district court judge had complete control in referring the matter to a magistrate. and that he could freely reject the magistrate's recommendation, rehear evidence in whole or in part, call for additional findings and exercise the ultimate authority in issuing an order. Both *Glidden* and *Raddatz* directly refute the Government's suggestion that mere appellate review by Article III judges satisfies the requirements of Article III.

Similarly, the constitutionality of the new Bankruptcy Courts cannot be sustained by terming them legislative or Article I courts. The authorities relied upon by the Government for this proposition reveal only that Congress may create Article I courts for specialized geographic areas in which it possesses local governmental powers and within the United States for specialized subject matters arising between the federal government and others. This Court has held that Article III restraints placed upon the federal government acting in the states do not apply in those special geographic areas in which the federal government exercises powers of a local government. *Palmore v. United States*, 411 U.S. 389 (1973); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 619 (1838); *The American Insurance Co. v. 356 Bales of Cotton (Canter)*, 26 U.S. (1 Pet.) 511

(1828). The principle enunciated by the Court in these cases directly undercuts appellants' argument that Congress may create a non-Article III federal tribunal which can exercise the powers of a court of law, equity and admiralty. In this Court's first discussion of the distinction between Article III (constitutional) courts and Article I (legislative) courts, Chief Justice Marshall stated that "admiralty jurisdiction can be exercised *in the states* in those courts *only* which are established in pursuance of the third article of the Constitution. . . ." *Canter, supra* at 546 (emphasis added). The Reform Act, however, explicitly authorizes non-Article III federal bankruptcy judges to sit as a court of admiralty, as well as a court of law and equity. 28 U.S.C. §1481.

The rationale found in the other Article I court cases cited by the Government is also inapplicable in that those cases involved specialized tribunals adjudicating matters arising between the government and others, which, if Congress so chose, are capable of purely executive or legislative determination: claims against the government, *Williams v. United States,* 289 U.S. 553 (1933); customs claims, *Ex Parte Bakelite Corp.,* 279 U.S. 438 (1929);[3] land claims, *United States v. Coe,* 155 U.S. 76 (1894); tax collection, *Burns, Stix Friedman & Co. Inc. v. Commissioner,* 57 T.C. 392 (1971);[4] and military disciplinary mat-

[3]The Court of Claims and Court of Customs and Patent Appeals were held subsequently to be Article III courts. *Glidden v. Zdanok,* 370 U.S. 530 (1962).

[4]The constitutionality of the Tax Court has never been addressed by this Court. The Tax Court upheld its own status noting that it, unlike the new Bankruptcy Court, cannot enter binding money judgments and has no jurisdiction to execute its decisions. *Burns, Stix Friedman & Co. v. Comm'r.,* 57 T.C. 392, 396 (1971).

ters, *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858).* These cases were premised upon the right of the sovereign to use summary legislative or executive action to collect taxes and duties, to settle claims against the sovereign, and to discipline the military. At no time in this country's history, however, have lawsuits initiated by trustees on behalf of bankrupts against other parties been considered amenable to executive or legislative determination. *See*, Katz, *Federal Legislative Courts*, 43 Harv. L.Rev. 894, 916 (1930). None of the Article I legislative court cases support the withdrawal of Article III protection from the resolution of private disputes under state, federal and constitutional law by federal courts operating within the geographical limits of the various states.

Finally, the Government's reliance upon *Palmore v. United States*, 411 U.S. 389 (1973), for the supposed constitutional principle of efficiency and convenience of judicial administration is wholly without merit. The Government suggests that this Court upheld the establishment of local courts for the District of Columbia without life tenure because of the need "to relieve the regular Art. III courts . . . from the smothering responsibility for [a] great mass of litigation." Gov't J.S. at 12, quoting *Palmore, supra*, at 408-409. *Palmore* did not uphold the establishment of local Article I courts on the grounds that they were more convenient, but rather on the ground that Congress was acting within its sovereign power as the local government for the District of Columbia. 411 U.S. at

*The legislative and executive power over military discipline has been carefully limited by this Court to "the least possible power adequate to the end proposed." *Toth v. Quarles*, 350 U.S. 11, 23, 100 L.Ed. 8, 17 (1955); *O'Callahan v. Parker*, 395 U.S. 258, 23 L.Ed.2d 291 (1969); *Ex Parte Milligan*, 71 U.S. (4 Wall) 2, 18 L.Ed. 281 (1866).

397. Nor is Appellee aware of any decision of this Court holding that the Article III constitutional guarantees intended to uphold the independence of federal courts. whether they be federal Bankruptcy Courts, district courts or courts of appeal, can be sacrificed on the altar of convenience or efficiency.

6. Fully mindful that Congressional reform of the bankruptcy court system sought to establish an independent court, the District Court below astutely observed:

> "One wonders, however, what measure of independence is gained through a court system that calls for its judges to sit for a limited number of years constantly under the threat of removal from office by a majority vote of their judicial brethren and open to possible retaliation in the form of salary cuts from Congress. Indeed, vesting such a precariously situated court with nearly the full panoply of district court jurisdiction and power effectively denies every litigant tangentially connected with a bankruptcy an independent and impartial forum in which to have his dispute resolved, regardless of the nature of his dispute. In turn, as a significant number of cases and controversies are removed from the sphere of Article III court determination, upon the theory that Congress has the authority to legislate in a certain subject area, the independence of the entire judicial branch is compromised. For the bankruptcy power is no different in this respect then the power to regulate commerce or any other source of national legislation. See H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 86 (1977) (letter of Herbert Wechsler).
>
> * * *
>
> The creation of a court system vested with broad federal question jurisdiction without the guarantees

of life tenure and undiminishable salary disrupts the delicate balance of power in our federal system giving rise to the possibility of a lessening of our personal freedoms." *Marathon, supra* at 956. (Gov't. J.S.App. 24a-26a)

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

Bankruptcy Reform Act of 1978, Pub. L. 95-598

Title II

Sec. 201. (a) Title 28 of the United States Code is amended by inserting immediately after chapter 5 the following:

"Sec.

"151. Creation and composition of bankruptcy courts.
"152. Appointment of bankruptcy judges.
"153. Tenure and residence of bankruptcy judges.
"154. Salaries of bankruptcy judges.
"155. Chief judge; precedence of bankruptcy judges.
"156. Division of business among bankruptcy judges.
"157. Times of holding court.
"158. Accommodations at places for holding court.
"159. Vacant judgeship as affecting proceedings.
"160. Appellate panels.

§ 151. Creation and composition of bankruptcy courts

"(a) There shall be in each judicial district, as an adjunct to the district court for such district, a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district.

"(b) Each bankruptcy court shall consist of the bankruptcy judge or judges for the district in regular active service. Justices or judges designated and assigned shall be competent to sit as judges of the bankruptcy court.

"(c) Except as otherwise provided by law, or rule or order of court, the judicial power of a bankruptcy court with respect to any action, suit or proceeding may be ex-

ercised by a single bankruptcy judge, who may preside alone and hold a regular or special session of court at the same time other sessions are held by other bankruptcy judges.

"§ 152. Appointment of bankruptcy judges

"The President shall appoint, by and with the advice and consent of the Senate, bankruptcy judges for the several judicial districts. In each instance, the President shall give due consideration to the recommended nominee or nominees of the Judicial Council of the Circuit within which an appointment is to be made.

"§ 153. Tenure and residence of bankruptcy judges

"(a) Each bankruptcy judge shall hold office for a term of 14 years, but may continue to perform the duties of his office until his successor takes office, unless such office has been eliminated.

"(b) Removal of a bankruptcy judge during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, or physical or mental disability. Removal shall be by the judicial council of the circuit or circuits in which the bankruptcy judge serves, but removal may not occur unless a majority of all the judges of such circuit council or councils concur in the order of removal. Before any order of removal may be entered, a full specification of the charges shall be furnished to the bankruptcy judge, and he shall be accorded an opportunity to be heard on the charges. Any cause for removal of any bankruptcy judge coming to the knowledge of the Director of the Administrative Office of the United

States Courts shall be reported by him to the chief judge of the circuit or circuits in which he serves, and a copy of the report shall at the same time be transmitted to the circuit council or councils and to the bankruptcy judge.

"(c) Each bankruptcy judge shall reside in the district or one of the districts for which he is appointed, or within 20 miles of his official station.

"(d) If the public interest and the nature of the business of a bankruptcy court require that a bankruptcy judge should maintain his abode at or near a particular part of the district the judicial council of the circuit may so declare and may make an appropriate order. If the bankruptcy judges of such a district are unable to agree as to which of them shall maintain his abode at or near the place or within the area specified in such an order the judicial council of the circuit may decide which of them shall do so.

"§ 154. Salaries of bankruptcy judges

"Each judge of a bankruptcy court shall receive a salary at an annual rate of $50,000, subject to adjustment under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), and section 461 of this title.

"§ 160. Appellate panels

"(a) If the circuit council of a circuit orders application of this section to a district within such circuit, the chief judge of each circuit shall designate panels of three bankruptcy judges to hear appeals from judgments, orders, and decrees of the bankruptcy court of the United States for such district. Except as provided in section 293(e) of this

title, a panel shall be composed only of bankruptcy judges for districts located in the circuit in which the appeal arises. The chief judge shall designate a sufficient number of such panels so that appeals may be heard and disposed of expeditiously.

"(b) A panel designated under subsection (a) of this section may not hear an appeal from a judgment, order, or decree entered by a member of the panel.

"(c) When hearing an appeal, a panel designated under subsection (a) of this section shall sit at a place convenient to the parties to the appeal.".

Section 206. Section 294 of title 28 of the United States Code is amended—

(1) in subsection (c), by deleting "or district" and inserting "district or bankruptcy judge"; and

(2) in subsection (d), by striking out "or district judge" and inserting in lieu thereof ", district judge or bankruptcy judge".

Sec. 207. Section 295 of title 28 of the United States Code is amended by striking out "or district" and inserting in lieu thereof "district, or bankruptcy".

Sec. 213. Section 451 of title 28 of the United States Code is amended—

(1) by inserting a comma and "and bankruptcy courts, the judges of which are entitled to hold office for a term of 14 years" immediately before the period at the end of the paragraph beginning with "The term 'court of the United States' "; and

(2) by inserting a comma and "and judge of the bankruptcy courts, the judges of which are entitled to hold office for a term of 14 years" immediately before the period at the end of the paragraph beginning with "Term 'judge of the United States'."

Sec. 236. (a) Chapter 83 of title 28 of the United States Code is amended by inserting immediately after section 1292 the following:

"§ 1293. Bankruptcy appeals

"(a) The courts of appeals shall have jurisdiction of appeals from all final decisions of panels designated under section 160(a) of this title.

"(b) Notwithstanding section 1482 of this title, a court of appeals shall have jurisdiction of an appeal from a final judgment, order, or decree of an appellate panel created under section 160 or a District Court of the United States or from a final judgment, order, or decree of a bankruptcy court of the United States if the parties to such appeal agree to a direct appeal to the court of appeals.".

* * *

Sec. 237. Section 1294 of title 28 of the United States Code is amended—

(1) by striking out "direct and territorial" and inserting in lieu thereof "district, bankruptcy, and territorial";

(2) by striking out the period at the end thereof and inserting a semicolon; and

(3) by adding at the end thereof the following:

"(5) From a panel designated under section 160 (a) of this title to the court of appeals for the circuit in which the panel was so desginated;

"(6) From a bankruptcy court of the United States to the court of appeals for the circuit embracing the district in which the bankruptcy court is located.".

Sec. 238. (a) Section 1334 of title 28 of the United States Code is amended to read as follows:

"§ 1334. Bankruptcy appeals

"(a) The district courts for districts for which panels have not been ordered appointed under section 160 of this title shall have jurisdiction of appeals from all final judgments, orders, and decrees of bankruptcy courts.

"(b) The district courts for such districts shall have jurisdiction of appeals from interlocutory orders and decrees of bankruptcy courts, but only by leave of the district court to which the appeal is taken.

"(c) A district court may not refer an appeal under that section to a magistrate or to a special master.".

* * *

Sec. 241. (a) Title 28 of the United States Code is amended by inserting immediately after chapter 89 the following:

"CHAPTER 90—DISTRICT COURTS AND BANKRUPTCY COURTS

"Sec.
"1471. Jurisdiction.
"1472. Venue of cases under title 11.

"1473. Venue of proceedings arising under or related to cases under title 11.
"1474. Venue of cases ancillary to foreign proceedings.
"1475. Change of venue.
"1476. Creation or alteration of district or division.
"1477. Cure or waiver of defects.
"1478. Removal to the bankrupcty courts.
"1479. Provisional remedies; security.
"1480. Jury trials.
"1481. Powers of bankruptcy court.
"1482. Appeals.

* * * * * * * * * * *

"§ 1471. Jurisdiction

"(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

"(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

"(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

"(d) Subsection (b) or (c) of this section does not prevent a district court of a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a

case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

"(e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.

§ 1473. Venue of proceedings arising under or related to cases under title 11.

(a) Except as provided in subsections (b) and (d) of this section, a proceeding arising in or related to a case under title 11 may be commenced in the bankruptcy court in which such case is pending.

* * *

(c) Except as provided in section (b) of this section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case as statutory successor to the debtor or creditors under section 541 or 544 (b) of title 11 in the bankruptcy court for the district where the State or Federal court sits in which, under applicable nonbankruptcy venue provisions, the debtor or creditors, as the case may be, may have commenced an action on which such proceeding is based if the case under title 11 had not been commenced.

"§ 1478. Removal to the bankuptcy courts

"(a) A party may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or a civil action by a Government

unit to enforce such governmental unit's police or regulatory power, to the bankruptcy court for the district where such civil action is pending, if the bankruptcy courts have jurisdiction over such claim or cause of action.

"(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order under this subsection remanding a claim or cause of action, or a decision not so remanding, is not reviewable by appeal or otherwise.

"§ 1479. Provisional remedies; security

"(a) Whenever any action is removed to a bankruptcy court under section 1478 of this title, any attachment or sequestration of the goods or estate of the defendant in such action shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the court from which the action was removed, unless the attachment or sequestration is invalidated under applicable law.

"(b) Any bond, undertaking, or security given by either party in an action prior to removal under section 1478 of this title shall remain valid and effectual notwithstanding such removal, unless such bond, undertaking, or other security is invalidated under applicable law.

"(c) All injunctions, orders, or other proceedings, in an action prior to removal of such action under section 1478 of this title shall remain in full force and effect until dissolved or modified by the bankruptcy court.

"§ 1480. Jury trials

"(a) Except as provided in subsection (b) of this section, this chapter and title II do not affect any right to trial by jury, in a case under title 11 or in a proceeding arising under title 11 or arising in or related to a case under title 11, that is provided by any statute in effect on September 30, 1979.

"(b) The bankruptcy court may order the issues arising under section 303 of title 11 to be tried without a jury.

"§ 1481. Powers of bankruptcy court

"A bankruptcy court shall have the powers of a court of equity, law, and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment.

"§ 1482. Appeals

"(a) Panels designated under section 160 (a) of this title shall have jurisdiction of appeals from all final judgments, orders, and decrees of bankruptcy courts.

"(b) Panels designated under section 160 (a) of this title shall have jurisdiction of appeals from interlocutory judgments, orders, and decrees of bankruptcy courts, but only by leave of the panel to which the appeal is taken.".

Sec. 250. (a) Chapter 153 of title 28 of the United States Code is amended by adding at the end thereof the following:

"§ 2256 **Habeas corpus from bankruptcy courts**

"A bankruptcy court may issue a writ of habeas corpus—

"(1) when appropriate to bring a person before the court—

"(A) for examination;

"(B) to testify; or

"(C) to perform a duty imposed on such person under this title; or

"(2) ordering the release of a debtor in a case under title 11 in custody under the judgment of a Federal or State court if—

"(A) such debtor was arrested or imprisoned on process in any civil action;

"(B) such process was issued for the collection of a debt—

"(i) dischargeable under title 11; or

"(ii) that is or will be provided for in a plan under chapter 11 or 13 of title 11; and

"(C) before the issuance of such writ, notice and a hearing have been afforded the adverse party of such debtor in custody to contest the issuance of such writ".

Title IV

Transition

[Courts During Transition]

Sec. 404. (a) The courts of bankruptcy, as defined under section 1 (10) of the Bankruptcy Act, created under section 2a of the Bankruptcy Act, and existing on September 30, 1979, shall continue through March 31, 1984,

to be the courts of bankruptcy for the purposes of this Act and the amendments made by this Act. Each of the courts of bankruptcy so continued shall constitute a separate department of the district court that is such court of bankruptcy under the Bankruptcy Act.

(b) The term of a referee in bankruptcy who is serving on the date of enactment of this Act is extended to and expires on March 31, 1984 or when his successor takes office. During the period commencing on October 1, 1979, and ending on March 31, 1984 (hereinafter in this title referred to as "the transition period"), unless such referee is found to be not qualified by the Chief Judge of the Circuit Court after consultation with a merit screening committee established as provided in subsection (c) of this section, such a referee in bankruptcy upon the expiration of his appointed term as referee shall have the title of the United States bankruptcy judge, and shall serve in the court of bankruptcy continued under subsection (a) of this section that appointed such United States bankruptcy judge, in the manner prescribed by this title. Section 8335 (a) of title 5 of the United States Code shall not apply in respect of United States bankruptcy judges during the transition period.

(c) There shall be established for each State a merit screening committee composed of the president or the designee of the president of the State bar association, the dean or the designee of the dean of a law school located within the State, and the president or designee of the president of a local bar association for the area wherein a referee in bankruptcy maintains his official headquarters within the State. Each such merit screening committee

shall be organized and summoned to meetings by the circuit executive for the circuit embracing the State, who shall serve as secretary of each such screening committee established within the circuit. Before the expiration of the term of a referee in bankruptcy in office on the date of enactment of this Act, or if his successor has not been appointed before the date of enactment of this Act, a merit screening committee shall be organized by the circuit executive to pass on the qualifications of such referee for the purpose of determining whether the term of such referee shall be extended as provided under subsection (b) of this section.

(d) Except as otherwise provided in this section or in section 407 of this Act, matters relating to the office of United States bankruptcy judges and to United States bankruptcy judges shall continue to be governed during the transition period by the rules set forth in sections 34, 35, 36, 40a, 40b, 40d, 41 and 43 of the Bankruptcy Act as such Act existed on September 30, 1979. A court of bankruptcy may not appoint an individual under such section 34 if the merit screening committee established under subsection (c) of this section for the district of such court finds such individual to be not qualified.

* * *

(f) During the transition period, the provisions of sections 455, 456, 569 (a), 571 (b), 620 (b) (3), and 957 (a) of title 28 of the United States Code shall apply to United States bankruptcy judges and to any court officers or employees appointed or employed under subsection (e) of this section the same as such sections apply to the bankruptcy judges, and to any court officers or employees,

of a United States bankruptcy court established under section 201 of this Act. During the transition period, the position of United States bankruptcy judge shall be deemed to be a position within the purview of subparagraph (C) of section 225 (f) of the Federal Salary Act of 1967 (2 U.S.C. 356 (C)).

* * * *

[Jurisdiction And Procedure During Transition]

Sec. 405. (a) (1) All cases commenced under title 11 of the United States Code during the transition period shall be referred to the United States bankruptcy judges. The United States bankruptcy judges may exercise in such cases the jurisdiction and powers conferred by subsection (b) of this section on the courts of bankruptcy continued by section 404 (a) of this Act, and all proceedings in such cases shall be before the United States bankruptcy judges, except—

(A) a proceeding to enjoin a court;

(B) a proceeding to punish a criminal contempt—

(i) not committed in the bankruptcy judge's actual presence; or

(ii) warranting a punishment of imprisonment; or

(C) an appeal from a judgment, order, decree, or decision of a United States bankruptcy judge.

(2) Except as provided in subsection (c) of this section, any proceeding in a court of bankruptcy in a case under title 11 of the United States Code that is not before the

United States bankruptcy judge shall be before the judge of the court of bankruptcy for the district in which such case is pending.

(b) During the transition period, the amendments made by sections 241, 243, 250, and 252 of this Act shall apply to the courts of bankruptcy continued by section 404 (a) of this Act the same as such amendments apply to the United States bankruptcy court established under section 201 of this Act.

(c) (1) During the transition period, an appeal from a judgment order, or decree of a United States bankruptcy judge shall be—

(A) if the circuit council of the circuit in which the bankruptcy judge sits so orders for the district in which the bankruptcy judge sits, then to a panel of three bankruptcy judges appointed in the manner prescribed by section 160 of title 28 of the United States Code, as added by section 201 of this Act;

(B) if the parties to the appeal agree to a direct appeal to the court of appeals for such circuit, then to such court of appeals; or

(C) to the district court for the district in which the bankruptcy judge sits.

(2) During the transition period, the jurisdiction of the district courts, the courts of appeals, and panels of bankruptcy judges to hear appeals shall be the same as the jurisdiction of such courts and panels granted under the amendments made by sections 236, 237, 238, and 241 of this Act to hear appeals from the judgments, orders, and decrees of the bankruptcy courts established under section 201 of this Act.

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No. 81-150, 81-546

IN THE

Supreme Court of the United States

October Term, 1981

NORTHERN PIPELINE CONSTRUCTION CO.,
Appellant,

vs.

MARATHON PIPELINE COMPANY and
UNITED STATES OF AMERICA,
Appellees,

UNITED STATES OF AMERICA,
Appellant,

vs.

MARATHON PIPELINE COMPANY and
NORTHERN PIPELINE CONSTRUCTION CO.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

BRIEF FOR APPELLANT NORTHERN PIPELINE CONSTRUCTION CO.

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QUESTION PRESENTED

Whether Congress has the power to delegate the jurisdiction provided in 28 U.S.C. § 1471 to bankruptcy judges lacking Article III requisites as to tenure and compensation.

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

BRIEF FOR APPELLANT NORTHERN PIPELINE CONSTRUCTION CO.

OPINIONS BELOW

The Order and Memorandum of the District Court (A-1a)[1] are reported at 12 B.R. 946 (D. Minn. 1981). The opinion of the bankruptcy court (A-27a) is reported at 6 B.R. 928 (D. Minn. 1980).

JURISDICTION

The judgment of the District Court (A-1a) was entered on April 23, 1981.

A Notice of Appeal to this Court was duly filed by the United States of America (intervenor in the proceedings below) in the District Court for the District of Minnesota, Fourth Division, on May 19, 1981 (A-37a); a Notice of Appeal was duly filed by this appellant in the District Court of Minnesota for the Fourth Division on May 20, 1981 (A-13).[2] Probable jurisdiction was noted on November 9, 1981. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, United States Constitution:

> Congress shall have the power:
>
> To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
>
> To constitute Tribunals inferior to the supreme Court;

---

[1] References to the Jurisdictional Statement of Appellant United States of America are cited as "A- ".

[2] The Notice of Appeal is set forth at A-13 of the Jurisdictional Statement of Appellant Northern Pipeline Construction Co.

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article III, Section 1, United States Constitution:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behavior . . . .

Relevant provisions of the Bankruptcy Reform Act, Pub.L. No. 95-598 (Nov. 6, 1978), 92 Stat. 2549 (A-39a).

STATEMENT OF THE CASE

1. Procedural History.

Appellant, Northern Pipeline Construction Company ("Northern"), is a debtor in a proceeding for reorganization under Chapter 11 of the Bankruptcy Code.

On March 8, 1979 (prior to initiation of reorganization proceedings) Northern instituted a lawsuit against the appellee, Marathon Pipeline Company ("Marathon"), in the United States District Court for the Western District of Kentucky. Jurisdiction was based upon diversity of citizenship, 28 U.S.C. § 1332 and upon the enforcement of a mechanics lien under Kentucky Revised Statutes, § 376.090 pursuant to 28 U.S.C. § 1655.

The Complaint in the District Court asserted claims for relief arising out of the construction by Northern for Marathon of certain oil product pipelines in Jefferson County, Kentucky.

An Answer and Counterclaim were interposed by Marathon and limited discovery was undertaken by both parties.

On January 14, 1980, Northern filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court, District of Minnesota, Third Division.

On March 25, 1980, Northern, as debtor-in-possession, filed and served a Complaint against Marathon, initiating an adversary proceeding under the Bankruptcy Code. The Complaint in bankruptcy court asserted the same claims brought in the lawsuit pending in the District Court with the exception of the claim for mechanics lien relief.

Appellee Marathon moved the bankruptcy court for dismissal for lack of jurisdiction and alternatively for dismissal, abstention or transfer of the adversary proceeding, which motion was denied by the bankruptcy court on November 17, 1980.[3]

Appellee's application to the United States District Court for the District of Minnesota, Fourth Division, for leave to appeal the order of the bankruptcy court was denied on March 5, 1981. Upon appellee's motion for reconsideration, the District Court granted appellee's Motion for Leave to Appeal on March 26, 1981.

On April 23, 1981, the District Court entered an order dismissing the adversary proceeding instituted by Northern against Marathon, holding that the delegation of authority in 28 U.S.C. § 1471 to the bankruptcy judges was an unconstitutional delegation of jurisdiction.

Direct appeals to this Court pursuant to 28 U.S.C. § 1252 timely were perfected by both appellants.

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[3] Prior to its order, the bankruptcy court granted leave to intervene to the United States of America pursuant to 28 U.S.C. § 2403(a) and Rule 24(a)(1), Federal Rules of Civil Procedure.

2. The Bankruptcy Reform Act.

After careful consideration and hearings, Congress enacted the Bankruptcy Reform Act, Pub.L.No. 95-598, 92 Stat. 2549. The legislation enacted by Congress reflects a comprehensive reform of previous bankruptcy law. At issue in this appeal is whether Congress' decision to staff the bankruptcy court with bankruptcy judges appointed to 14-year terms violates the provisions of Article III of the Constitution. Article III requires that when the "judicial power of the United States" is exercised, those exercising that power must be provided with lifetime tenure and protection against salary reduction.

The Bankruptcy Reform Act of 1978 established a new court (the United States Bankruptcy Court) in each judicial district as an adjunct to the District Court for each district. 28 U.S.C. § 151 (Supp. III 1979). The Act thus eliminated the old referee system in existence previously. Judges of the new bankruptcy courts are to be appointed to 14-year terms by the President, with the advice and counsel of the Senate, as contrasted with the old system where bankruptcy referees were appointed for six-year terms by the District Court. Bankruptcy judges under the new Act are subject to removal for incompetence, misconduct or disability by the Judicial Council of the circuit. 28 U.S.C. §§ 152, 153 (Supp. III 1979).

Another important change effected by the Act is the abolition of the distinction between summary and plenary jurisdiction. Under the new Act, bankruptcy courts may exercise jurisdiction of "all civil proceedings arising under Title 11 or arising in or related to cases under Title 11." 28 U.S.C. § 1471 (c) (Supp. III 1979). Thus, bankruptcy courts created under the Act are allowed greater powers than those bestowed under previous legislation. Although the bankruptcy courts

"shall have the powers of a court of equity, law and admiralty" the courts' powers have been limited by Congress. Bankruptcy courts may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment. 28 U.S.C. § 1481 (Supp. III 1979).

Finally, the new Act provides an appeals procedure which ensures that review will be made by an Article III judge. A panel of three bankruptcy judges to hear appeals may be designated by the Chief Judge of the circuit. 28 U.S.C. § 160. These panels would have jurisdiction of all appeals from final orders of the bankruptcy courts and, with leave of the panel, of interlocutory appeals. 28 U.S.C. § 1482. In the event that no such panel is designated, the District Court would undertake appellate review. 28 U.S.C. § 1334 (Supp. III 1979). The Court of Appeals is empowered to hear appeals from either the appellate panel (if designated) or the District Court. 28 U.S.C. § 1293(a) (Supp. III 1979). Upon agreement of the parties, a direct appeal to the Court of Appeals may be taken from a final judgment of the bankruptcy court. 28 U.S.C. § 1293(b) (Supp. III 1979).

This appeal is a result of a perceived conflict between Article I and Article III.

SUMMARY OF ARGUMENT

The decision of the United States District Court below is erroneous.

It cannot be argued that Congress lacks the power to create some kind of bankruptcy court to administer such "uniform laws on the subject of bankruptcies." Further, it cannot be seriously contended that Congress lacks the power to create some form of a bankruptcy court staffed by judges lacking Article III protection as to tenure and compensation.

Stripped to its essence, the decision of the District Court is premised upon the view that Congress created the *wrong* kind of court, i.e., a court which may entertain plenary actions as well as summary proceedings. The District Court reasoned that plenary actions are capable of determination only by Article III courts exercising the judicial power. This premise led the Court below to its conclusion that the grant of jurisdiction by Congress to courts whose judges lacked Article III protection as to tenure and compensation was unconstitutional. This reasoning process discloses its own error.

The Constitution allows Congress to create "legislative courts" under Article I as well as inferior federal courts which exercise Article III judicial power.

Although Article I courts may not receive Article III "judicial power," nevertheless, this prohibition does not prevent legislative courts from deciding disputes and questions which may also be decided by Article III courts as long as the disputes and questions for decision are properly within one of the enumerated areas for which legislative courts may be established under Article I. For example, plenary actions are decided by non-Article III state courts. Plenary actions may also be decided by Article I courts without offense to Article

III. The mere fact that a legislative court may decide plenary suits and in doing so act in a "judicial" manner does not mean that such a legislative court exercises the "judicial power of the United States." Legislative courts can try criminal cases, construe contracts and determine breaches thereof, and adjudicate land titles, etc., but this in and of itself does not make legislative courts Article III courts.

The critical distinction between Article I and Article III courts lies in the nature of their jurisdiction. Article I legislative courts are restricted in their jurisdiction to proceedings which arise within the limited context of the specific power enumerated in Article I by which that legislative court is created—that specialized area described by the specific power. Article III courts, on the other hand (although their jurisdiction is limited by the terms of Article III), are free to determine cases and controversies within their jurisdiction to the full extent provided by Article III and without any limitation on their exercise of judicial power of the kind imposed on legislative courts by Article I. Put another way, legislative courts can only function within the limits of an enumerated power of Article I while Article III courts are permitted to entertain all controversies of whatever nature that fall within their jurisdiction.

Specifically as it relates to this appeal, bankruptcy courts can entertain a plenary action only where there is a bankruptcy as provided for by Article I, § 8. Bankruptcy courts do not have the power to entertain plenary actions except insofar as such actions are necessary to effectuate uniform laws on the subject of bankruptcies granted to Congress by Article I, § 8. Thus, bankruptcy courts established by this Act are properly constituted Article I courts and need not meet Article III requisites. . .

Additionally, Congress incorporated several provisions into the Act to ensure that any perceived constitutional objection to the legislation would be met. Accordingly, provisions relating to the jurisdiction and supervision of the bankruptcy courts, the scope of powers of the bankruptcy judges, and the appellate review available of right were specifically included in the Act. The bankruptcy courts operate as adjuncts to, and thus subordinate to, the District Courts. The decisions made in the bankruptcy courts may be reviewed either by the District Courts or by Courts of Appeals.

For the reasons set forth herein, the decision of the District Court should be reversed.

ARGUMENT

A. The Decision of the District Court is in Error.

The sole issue presented by appellee's interlocutory appeal from the bankruptcy court to the District Court was whether the Bankruptcy Act's grant of jurisdiction to the bankruptcy court was an unconstitutional delegation of Article III jurisdiction to judges lacking Article III requisites. The District Court agreed with appellee's contentions, found the Act unconstitutional and directed a dismissal of appellant Northern's adversary proceeding against the appellee (A-1a - 2a).

The court below was troubled by the grant of jurisdiction of plenary matters and found that grant to be "amazingly broad as it encompasses claims based on both federal and state law." (A-7a). In the opinion of the District Court, bankruptcy courts created by the Act have been "endowed with the full array of judicial powers" with minor exceptions (A-9a). The District Court therefore concluded that bankruptcy judges exercise virtually the same power as District

Court judges (A-10a).[4] The court reasoned that since actions heard by the bankruptcy court may include cases which fall within the scope of Article III "judicial power", therefore the delegation of jurisdiction was unconstitutional (A-24a).

The error of the District Court's decision lies in its misapprehension of the nature of legislative courts under Article I and the nature of "judicial power" under Article III.

B. Legislative Courts Created Under Article I Previously Have Decided Plenary Actions.

Although the appropriate sphere of judicial activity by legislative courts created under Article I has been the subject of disagreement and debate, some fundamental principles concerning the nature of Article I courts have emerged.

Under Article I Congress is empowered to create "legislative courts" which may perform judicial functions. *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828). Legislative courts may be created by Congress to adjudicate disputes falling within specialized areas enumerated in Article I. *Palmore v. United States*, 411 U.S. 389 (1973). Congress has the authority to create legislative courts with jurisdiction over matters of national concerns and its power to create such courts is not limited to matters of territorial or local concern. *Ex parte Bakelite Corp.*, 279 U.S. 438, 449 (1929); *Crowell v. Benson*, 285 U.S. 22, 54 (1932). While Article I courts do not and cannot receive the "judicial power of the United States," *American Insurance Co. v. Canter, supra*, Congress may grant legislative courts jurisdiction over matters previously within the jurisdiction of Article III courts.

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[4] The court stated:

> "Yet while the new bankruptcy judges hear virtually the same range of matters and exercise nearly identical powers as an Article III district judge, these new judges are not Article III judges but rather Article I judges." (A-10a).

Cary v. Curtis, 44 U.S. (3 How.) 236 (1845). Judges of validly constituted legislative courts may be appointed for such terms and at such compensation as Congress may determine unaffected by the requisites of Article III. *Ex parte Bakelite Corporation, supra.*

Legislative courts have always been recognized as appropriate forums for the decision of both federal and state law questions. A brief review of some Article I court decisions includes the following areas:

1. Claims in admiralty — *American Insurance Co. v. Canter, supra*;[5]
2. Claims for customs' taxes — *Cary v. Curtis, supra*;[6]
3. Court martials for military and naval offenses — *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858);
4. Claims under the Tariff Act — *Ex parte Bakelite Corporation, supra*;
5. Claims for determination of private land claims in certain western states and territories — *United States v. Coe*, 155 U.S. 76 (1894);[7]

---

[5] Although the question in Canter was limited to a claim in admiralty, the decision validated the Congressional grant to the territorial Legislature of Florida for the establishment of a territorial court possessing jurisdiction over criminal cases, civil cases and all cases falling under the laws and Constitution of the United States as well as the jurisdiction invested in the court of the Kentucky District.

[6] Cary involved a claim brought in the Circuit Court for the Southern District of New York to recover monies paid for customs' duties. An Act of Congress had granted exclusive jurisdiction to the Secretary of the Treasury in such matters. The Court held that the Act did not offend Article III.

[7] The Coe decision upheld the constitutionality of an Act creating a private land claims court to determine Spanish or Mexican title in the territories of New Mexico, Arizona and Utah and in the States of Nevada, Colorado and Wyoming. While Coe dealt with lands in the territory of Arizona, this Court in Ex parte Bakelite Corporation, supra, noted that the decision in Coe would apply equally to lands within the states. 279 U.S. at 415.

6. Claims for maritime personal injury — *Crowell v. Benson*,[8] *supra*; and

7. Prosecution for crimes in the District of Columbia — *Palmore v. United States, supra.*

All of the claims noted above entail "plenary" actions of one type or another and all such "plenary" actions could be the subject of either state or federal jurisdiction. The District Court's concerns about plenary actions were, therefore, misplaced since it is clear that the mere grant of plenary authority to a legislative court is not in and of itself improper or unconstitutional. To be unconstitutional, the Article I

[8] The Court in Crowell affirmed provisions of the Longshoremen's and Harbor Workers' Compensation Act which delegated authority to the Deputy Commissioner of the United States Employees Compensation Commission to make awards concerning injured employees. Justice Brandeis, in dissent to the majority holding that de novo review avoided any conflict with Article III, argued that nothing in the Act provided for de novo review and that no conflict existed between the Act and Article III. He analyzed the matter as follows:

> The "judicial power" of Article III of the Constitution is the power of the federal government and not of any inferior tribunal. There is in that Article nothing which requires any controversy to be determined as of first instance in the federal district courts. The jurisdiction of those courts is subject to the control of Congress. Matters which may be placed within their jurisdiction may instead be committed to the state courts. If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal district courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process. Accumulation of precedents, already referred, has established that in civil proceedings involving property rights determinations of facts may constitutionally be made otherwise than judicially; and necessarily that evidence as to such facts may be taken outside of a court. I do not conceive that Article III has properly any bearing upon the question presented in this case. 285 U.S. at 86-87.

jurisdiction must intrude into Article III "judicial power of the United States" granted the Supreme Court and such inferior federal courts as Congress may see fit to create.

C. Bankruptcy Courts Do Not, and Cannot, Exercise the "Judicial Power of the United States."

Both legislative and Article III courts (as well as state courts) possess "judicial power." "Judicial power" is nothing more than "the power of a court to decide and pronounce judgment and carry it into effect between persons who bring a case before it for decision". *Muskrat v. United States*, 219 U.S. 346, 356 (1911). The "judicial power of the United States" as provided by Article III is distinct from "judicial power" generally. It is a power restricted to the limits established by that Article but *exercised to the fullest extent within those limits. Muskrat v. United States, supra.*

For example, the Tax Court, an Article I court, has the "judicial power" to decide controversies relating specifically to taxation. Its jurisdiction, however, is limited solely to that enumerated area. A federal district court, on the other hand, as an Article III court possesses the "judicial power of the United States" and therefore can decide cases or controversies of any nature—personal injury, antitrust, commercial disputes, criminal matters, etc.—falling within its jurisdiction.

The "judicial power of the United States" is not defined, then, by the nature of the actions which may be decided nor by an exclusive right to decide such actions. As noted by this Court in *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943):

> The congressional power to ordain and establish inferior courts includes the power "of investing them with *jurisdiction either limited, concurrent, or exclusive*, and of withholding jurisdiction from them in the exact

> degree and character which to Congress may seem proper for the public good. (Emphasis added).

Concurrent jurisdiction of constitutional courts, state courts and legislative courts, each operating within its proper realm, was the subject of comment by Justice Vinton in his dissent in *National Mutual Insurance Co. of District of Columbia v. Tidewater Transfer Co., Inc.*, 337 U.S. 582 (1948) where he stated:

> What has been said does not mean, of course that legislative courts cannot exercise jurisdiction over questions of the same nature as those enumerated in Article III § 2. It was clearly contemplated by the framers that state courts should have federal question jurisdiction concurrent with that exercised by inferior federal courts, yet they are not constitutional courts nor do they exercise the judicial power of Article III. The legislative courts created by Congress also can and do decide questions arising under the Constitution and the Laws of the United States (and in the case of territorial courts, other types of jurisdiction enumerated in Article III, § 2, as well), but that jurisdiction is not and cannot be, "a part of the judicial power which is defined in the Third Article of the Constitution." These courts are "incapable of receiving it." 337 U.S. 641.

Perhaps this point—that Article I courts can decide cases of the same nature as Article III courts—has caused the greatest difficulty in the reasoning which has been brought to the entire subject of Article I and Article III courts. However, the fact that courts may decide the same questions and yet be distinct under the Constitution is not meaningless as

Justice Vinton, again in *Tidewater, supra*, noted at 337 U.S. 644:

> It may be argued that the distinction between constitutional and legislative courts is meaningless if the latter may be invested with jurisdiction over subjects of Article III judicial power. But there are limitations which insure the preservation of the system of federal constitutional courts distinct from legislative courts. In the first place, *a legislative court must be established under some one of the specific powers given to Congress, and it is unlikely that all of the subjects of the judicial power could be justified as an exercise of those powers.* Furthermore, we cannot impute to Congress an intent now or in the future to transfer jurisdiction from constitutional to legislative courts for the purpose of emasculating the former. (Emphasis added).

This distinction was again noted in *Glidden Company v. Zdanok*, 370 U.S. 530 (1962). Justice Harlan (commenting upon Chief Justice Marshall's opinion in *Canter*) observed:

> All the Chief Justice meant, and what the case has ever after been taken to establish, is that in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that Article; courts, that is, having judges of limited tenure and entertaining business beyond the range of conventional cases and controversies. 370 U.S. at 544-45.

Most recently this Court in *Palmore v. United States, supra*, held that Congress under its Article I, §8 power could create a legislative court staffed with judges who are not accorded life tenure and protection against reduction in compensation.

The Court in *Palmore* responded to appellant's contentions that he had a right to be tried before an Article III judge as follows:

> This position ultimately rests on the proposition that Article III judges must preside over every proceeding in which a charge, claim or defense is based on an Act of Congress or a law made under its authority. At the very least, it asserts that criminal offenses under the laws passed by Congress may not be prosecuted except in courts established pursuant to Article III. In our view, however, there is no support for this view in either constitutional text or in constitutional history and practice. 411 U.S. at 400.

The Court went on to state further:

> It is apparent that neither this court nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Article III court before a judge enjoying lifetime tenure and protection against salary reduction. Rather, both Congress and this Court have recognized that state courts are appropriate forums in which federal questions and federal crimes may at times be tried; and that the requirements of Article III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate *plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment.* 411 U.S. at 407-408. (Emphasis added).

It is apparent from the foregoing discussion that the error of the court below lies in its failure to understand that the grant of jurisdiction to the bankruptcy courts under the new Bankruptcy Act is *not* co-extensive with the grant of jurisdiction made to the federal courts under Article III. Article III courts enjoy the jurisdiction provided by that Article of the Constitution to the *fullest extent* provided by Congress. *Muskrat v. United States, supra.* The federal court's jurisdiction is in no way diminished by the grant of jurisdiction to a bankruptcy court which will hear plenary matters *only in connection with a bankruptcy proceeding.* Further, while bankruptcy courts now may hear plenary actions, these are actions where jurisdiction would lie in the state courts, or in both state and federal courts as well. Thus, in no sense can federal jurisdiction be said to be diminished.

D. Bankruptcy is a Specialized Area Having Particularized Needs and Warranting Distinctive Treatment.

As this Court in *Palmore v. United States, supra,* noted, the Constitution granted the power to Congress to "legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." Although this question would appear to be resolved by the Constitution itself insofar as Congress is granted the specific power under Article I §8 to establish "* * * uniform laws on the subject of bankruptcies throughout the United States," nevertheless an examination of the particular nature and needs of bankruptcy and bankruptcy courts may be appropriate.

This Court has recognized the particular needs of appropriate administration for bankruptcy and the power of Congress in that regard. In *Taubel-Scott-Kitzmiller Co., Inc. v. Fox,* 264 U.S. 426, 430-31 (1924) it was noted:

> Congress has, of course, power to confer upon the bankruptcy court jurisdiction to adjudicate the rights of trustees to property adversely claimed. In matters relating to bankruptcy its power is paramount. Hence, even if the property is not within the possession of the bankruptcy court, Congress can confer upon it, as upon any other lower federal court, jurisdiction over the person in whose possession the property is.

As is pointed out by the *amicus curiae* brief for the Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York, at 14-21, and by the brief of the Commercial Law League of America, at 4-8, the need for Congress to legislate with respect to a specialized area having particularized needs and warranting distinctive treatment is amply justified in the area of bankruptcy. The volume of cases, the awkward distinction between summary and plenary actions, and the lack of bankruptcy specialists convinced Congress of the particularized need for a bankruptcy court with expanded jurisdiction and powers. A fundamental policy underlying the bankruptcy laws is the desire to effectuate a prompt, efficient and experienced administration and settlement of the affairs of a bankrupt estate. *Katchen v. Landry*, 382 U.S. 323, 328-329 (1966). Congress in its discretion sought to achieve these particular goals by the creation of a new bankruptcy court. This is the very kind of informed judgment made by Congress within one of the areas of enumerated powers that the *Palmore* decision speaks to. For this reason alone the judgment of Congress should not be disturbed.

E. Constitutional Safeguards Have Been Provided by Congress in Enacting the Act.

Congress also was aware of the potential for perceived constitutional tension if the bankruptcy bills pending in Congress were passed into law as sponsored. For that reason, Congress gave careful consideration to the views of constitutional scholars, judges, bankruptcy experts and others before enacting into law the Bankruptcy Reform Act. Hearings were held solely for this purpose. *See*, H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 22; Appendix II. As a result of those intensive deliberations and debates, the Congress enacted bankruptcy legislation which contains procedural and due process safeguards specifically designed to satisfy any constitutional criticisms expressed in those hearings.

The Act vests jurisdiction with the District Court. 28 U.S.C. §1471 (Supp. III 1979). The new bankruptcy court created by the Act exists as an adjunct to the District Court. 28 U.S.C. §1471(c) (Supp. III 1979). Thus, the bankruptcy court is subordinate to, and derives its powers, from the District Court, an Article III court.

Consistent with the principle of delegated powers and authority, appellate review and supervision by Article III judges are provided for in the Act. 28 U.S.C. §1293, 1334 (Supp. III 1979); Pub.L.No. 95-598, §405(c), 92 Stat. 2685. These review functions may be performed either by the District Court or by the Court of Appeals. See, *supra* at 6.[9]

Thus, the Congress carefully sought to avoid any perceived constitutional conflict by ensuring that the bankruptcy courts

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[9] The Act also provides that the circuit council may direct the Chief Judge of the circuit to designate panels of three bankruptcy judges to hear appeals. 28 U.S.C. §160 (Supp. III 1979).

would operate under the supervision, control and review of Article III courts.

This Court previously has concluded that factfinding need not be undertaken by a tenured Article III officer. *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406 (1980). In *Raddatz*, this Court held that the delegation of authority to a magistrate to hear live testimony and decide suppression motions in criminal matters did not violate the due process guarantee of the Fifth Amendment and Article III of the Constitution. 100 S.Ct. at 2416. The Court rejected the argument that all factfinding must be before an Article III judge, noting that ultimate review by the District Court satisfied any constitutional or procedural infirmity. *Id.* The decision in *Raddatz* with respect to this issue is consistent with and follows past court decisions in this regard. *Palmore v. United States, supra* at 410; *Crowell v. Benson, supra* at 51-52.

In *Crowell*, the Court upheld the Longshoremen's and Harbor Workers' Compensation Act, which delegated factfinding functions for employee claims to administrative officers. The Court stated that "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." *Id.*

In *Palmore*, non-tenured judges appointed to 15-year terms had been empowered by Congressional legislation to hear and decide criminal actions arising in the District of Columbia. In upholding the constitutionality of the legislation, the Court observed, "It is apparent that neither this Court nor Congress has read the constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Article

III court before a judge enjoying lifetime tenure and protection against salary reduction." *Palmore, supra,* at 407.

Moreover, the appeal procedure provided in the Act ensures that ultimate review will be made by the District Court or by the Court of Appeals.

Finally, Congress deliberately restricted the judicial powers that may be exercised by bankruptcy judges. Their criminal contempt power is limited and they are prohibited from enjoining proceedings in other courts. 28 U.S.C. §1481 (Supp. III 1979). These restrictions were enacted specifically in response to concerns expressed by various constitutional scholars who testified at the Congressional hearings preceding enactment of the legislation. *See,* H.R. Rep. No. 95-595, *supra,* at 38; Appendix II at 86.

In summary, the Act passed into law by Congress contains certain provisions specifically drafted to cure any constitutional impediment. Such procedures, particularly the grant of jurisdiction to the District Court and delegation of powers to an adjunct bankruptcy court operating under the supervision and control of the District Court, were incorporated in the actual legislation only after careful deliberations and hearings which solicited the differing views of constitutional and other legal scholars. Such safeguards reflect Congress' intent to avoid any constitutional conflict with Article III and to ensure ultimate supervision and review by Article III courts.

CONCLUSION

For the reasons set forth above, appellant Northern Pipeline Construction Co. requests that the Order entered by the District Court below be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1981

NORTHERN PIPELINE CONSTRUCTION CO., APPELLANT

v.

MARATHON PIPELINE CO., ET AL.

UNITED STATES OF AMERICA, APPELLANT

v.

MARATHON PIPELINE CO., ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

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QUESTION PRESENTED

Whether the exercise by bankruptcy judges of the jurisdiction defined in 28 U.S.C. (Supp. III) 1471, as provided by the Bankruptcy Act of 1978, violates Article III of the United States Constitution.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-150

NORTHERN PIPELINE CONSTRUCTION CO., APPELLANT

v.

MARATHON PIPELINE CO., ET AL.

No. 81-546

UNITED STATES OF AMERICA, APPELLANT

v.

MARATHON PIPELINE CO., ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order (J.S. App. 1a-2a)[1] and memorandum opinion (J.S. App. 3a-26a) of the district court are reported at 12 Bankr. Rep. 946. The opinion of the bankruptcy court (J.S. App. 27a-36a) is reported at 6 Bankr. Rep. 928.

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[1] "J.S. App." refers to the appendix in No. 81-546.

JURISDICTION

The judgment of the district court (J.S. App. 1a-2a) was entered on April 23, 1981. The United States filed a notice of appeal (J.S. App. 37a) on May 19, 1981. On July 13, 1981, Justice Blackmun extended the time for docketing the United States' appeal to and including September 16, 1981 (J.S. App. 38a), and the appeal was docketed on that date. Northern Pipeline Construction Co. filed a notice of appeal on May 20, 1981 (81-150 J.S. App. 13a), and the appeal was docketed on July 17, 1981. Probable jurisdiction in both appeals was noted on November 9, 1981, and the appeals were consolidated (J.A. 18-19). The jurisdiction of this Court rests on 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth at J.S. App. 39a-44a.

STATEMENT

1. In 1970 Congress created the Commission on the Bankruptcy Laws of the United States to study and recommend changes in federal bankruptcy law. The Commission prepared a detailed report on this subject, which included proposed legislation. See H.R. Doc. No. 93-137 (Pt. I), 93d Cong., 1st Sess. (1973) (hereinafter cited as "Commission Report"). This proposed legislation and an alternative bill proposed by the National Conference of Bankruptcy Judges were introduced in the 93d Congress. Both houses held extensive hearings on these bills during the 94th Congress. In addition, the House Judiciary Committee solicited and received the views of several

constitutional scholars concerning certain constitutional questions raised by the bills, including whether the Constitution requires that bankruptcy judges be given life tenure and salary protection. See H.R. Rep. No. 95-595, 95th Cong., 1st Sess., Appendix II, 63-87 (1977).

In the 95th Congress, a new bill was introduced in the House of Representatives that was based on both earlier bills and information received in the Congressional hearings. This bill, with amendments, was ultimately passed by the House as H.R. 8200 and sent to the Senate for its consideration on February 8, 1978. On September 22, 1978, the Senate passed its own bill, S. 2266, which differed in many significant respects from the House bill. No formal conference was held to resolve the differences between the bills. Instead, on September 28, the House passed, as an amendment to the Senate bill, a new version upon which the managers of the bills in both the House and Senate had agreed. See 124 Cong. Rec. 32392 (1978) (statement of Rep. Edwards). On October 5, this version was passed by the Senate with several further amendments, and the House passed the Senate's latest version the following day. 124 Cong. Rec. 34019, 34143-34145 (1978). Thereafter, on November 6, 1978, the President signed into law the Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 *et seq.*—the first comprehensive reform of the federal bankruptcy system since the Chandler Act of 1938.[2]

2. The purpose of the new Bankruptcy Act was a comprehensive "modernization of the bankruptcy

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[2] For a detailed account of the legislative history of the Act, see Klee, *A Legislative History of the New Bankruptcy Law*, 28 DePaul L. Rev. 941 (1979).

laws." S. Rep. No. 95-989, 95th Cong., 2d Sess. 2 (1978); H.R. Rep. No. 95-595, *supra*, at 2. To achieve this goal, Congress altered the structure and jurisdiction of the bankruptcy courts. Prior to 1978, federal district courts served as bankruptcy courts (see 11 U.S.C. 1(10)), but proceedings in bankruptcy cases generally were held before bankruptcy referees appointed by the district court, unless the district court elected to withdraw the case from the referee. See Bankruptcy Rule 102.[3] The judgment of the referee was final unless appealed to the district court within 10 days. Bankruptcy Rules 801-803.

Under prior law, the jurisdiction of the bankruptcy courts was defined in 11 U.S.C. 11. Bankruptcy courts were vested with "summary jurisdiction," which extended to controversies involving property in the actual or constructive possession of the court, such as property in the possession of the bankrupt during the proceedings. However, they did not have jurisdiction over "plenary" controveries, including disputes involving property in the possession of a third person, except by consent. See generally 2A *Collier on Bankruptcy* ¶ 38.09[2], at 1428, 1435 (14th ed. 1978); Commission Report, *supra*, at 88-89.

The new Bankruptcy Act eliminates the referee system and establishes "in each judicial district, as an adjunct to the district court for such district, a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district." 28 U.S.C. (Supp. III) 151(a). Whereas bankruptcy referees previously were appointed for six-year terms by the district court, the judges of

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[3] Since 1973, bankruptcy referees were considered "bankruptcy judges." Bankruptcy Rule 901(7).

the new bankruptcy courts are to be appointed to 14-year terms by the President, with the advice and consent of the Senate, and are subject to removal by the Judicial Council of the circuit for incompetence, misconduct, or disability. 28 U.S.C. (Supp. III) 152 and 153.

The new Act also eliminates the distinction between summary and plenary jurisdiction. It provides that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 [the Bankruptcy title] or arising in or related to cases under title 11." 28 U.S.C. (Supp. III) 1471(b). It further provides that "[t]he bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts." 28 U.S.C. (Supp. III) 1471(c).[4] Thus, subsequent to the filing of a petition pursuant to Title 11, the bankruptcy court may hear a wide variety of cases, including cases requiring trial by jury, that affect the property of the estate. 28 U.S.C. (Supp. III) 1472-1480.[5] The bankruptcy court "shall have the powers of a court of equity, law, and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." 28 U.S.C. (Supp. III) 1481.

The new Act also specifies a procedure for taking appeals from the bankruptcy court. The circuit coun-

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[4] The bankruptcy court and the district court have authority to abstain from adjudicating a particular controversy "in the interest of justice." 28 U.S.C. (Supp. III) 1471(d).

[5] The "property of the estate" is broadly defined by the new Code in 11 U.S.C. (Supp. IV) 541. It may include property in the possession of a third party.

cil is empowered to direct the Chief Judge of the circuit to designate panels of three bankruptcy judges to hear appeals. 28 U.S.C. (Supp. III) 160. These panels have jurisdiction of all appeals from final orders of bankruptcy courts, and, with leave of the panel, of interlocutory appeals. 28 U.S.C. (Supp. III) 1482. If no such appeals panel is designated, the district court is empowered to exercise appellate jurisdiction. 28 U.S.C. (Supp. III) 1334. The court of appeals is given jurisdiction of appeals from the appellate panels or the district court. 28 U.S.C. (Supp. III) 1293(a). If the parties agree, a direct appeal to the court of appeals may be taken from a final judgment of the bankruptcy court. 28 U.S.C. (Supp. III) 1293(b).

The Act also prescribes a transition period before the new provisions take full effect. Under Section 402(b) of the Act, 92 Stat. 2682, the provisions relating to the new bankruptcy courts do not formally become effective until April 1, 1984. During the transition period, previously existing bankruptcy courts continue in existence. Section 404(a), 92 Stat. 2683. Incumbent bankruptcy referees, whose terms of office are extended until March 31, 1984, or until their successors take office, are designated to serve as bankruptcy judges in the manner prescribed by the transition provisions. Section 404(b), 92 Stat. 2683.[6] Section 405 of the Act, 92 Stat. 2685, specifies that these bankruptcy judges shall exercise the jurisdiction of the bankruptcy courts in all cases

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[6] During the transition period, bankruptcy judges continue to be subject to removal from office by the district court for incompetency, misconduct, or neglect of duty pursuant to the old Bankruptcy Act (11 U.S.C. 62(b)). See Section 404(d) of the new Act, 92 Stat. 2684.

commenced under Title 11 during the transition period. That jurisdiction is defined in Section 405(b) (92 Stat. 2685) by reference to 28 U.S.C. (Supp. III) 1471, although the latter provision does not formally become effective until 1984. Similarly, the procedure for taking appeals from decisions of bankruptcy judges during the transition period is essentially the same as the procedure described above that will become effective in 1984. Section 405(c), 92 Stat. 2685.

3. On January 14, 1980, Northern Pipeline Construction Company filed a petition for reorganization in the United States Bankruptcy Court for the District of Minnesota. On March 25, 1980, Northern filed in that court (pursuant to 28 U.S.C. (Supp. III) 1471, made applicable by Section 405(b) of the Bankruptcy Act of 1978) the instant adversary proceeding against appellee Marathon Pipeline Company. Northern sought damages arising out of Marathon's alleged "breaches of contract and warranty, misrepresentation, coercion and duress, extra work orders or quantum meruit" (J.S. App. 28a).[7]

Marathon sought dismissal of Northern's complaint, contending that, by vesting the bankruptcy judge with jurisdiction over this plenary proceeding, the Bankruptcy Act of 1978 unconstitutionally confers Article III judicial power on judges who lack life tenure and protection against salary diminution. Because Marathon challenged the constitutionality of a federal statute, the United States intervened. Thereafter, the bankruptcy judge concluded that "the Congressional grant of power and jurisdiction made to

[7] Prior to filing its reorganization petition, Northern had filed suit against Marathon in the United States District Court for the Western District of Kentucky on the same contract claims asserted here. That case is still pending.

the Bankruptcy Court in the Bankruptcy Reform Act of 1978 is proper and constitutional" (*id.* at 32a) and denied the motion to dismiss (*id.* at 27a-36a).[8]

Marathon appealed to the district court. On April 23, 1981, the district court entered an order dismissing Northern's adversary proceeding against Marathon because "the delegation of authority in 28 U.S.C. § 1471 to the Bankruptcy Judges to try cases which are otherwise relegated under the Constitution to Article III judges is an unconstitutional delegation of authority" (J.S. App. 1a-2a). After Northern docketed an appeal to this Court, the district court filed a memorandum (J.S. App. 3a-26a) to supplement its order on July 24, 1981. The court stated that "the 1978 Act by eliminating the summary-plenary distinction and bestowing all jurisdiction relating to bankruptcy to the courts of bankruptcy has transferred Article III judicial power to an Article I tribunal" (*id.* at 17a). While it recognized that other Article I courts have exercised "judicial power" in various circumstances (*id.* at 18a-24a), the district court concluded that "necessarily concomitant to the increased powers, jurisdiction and independence of the bankruptcy judges are the life tenure and undiminishable salary guarantees of Article III of the United States Constitution. The creation of a court with such broad jurisdiction and power without the tenure and salary protections of Article III jeopardizes the independence of the entire judiciary" (*id.* at 10a-11a).

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[8] The bankruptcy judge also denied Marathon's motion to dismiss the adversary proceeding, or abstain from rendering a decision, because of the pending action in Kentucky. He further denied Marathon's request for a transfer of the action to the bankruptcy court in Kentucky (J.S. App. 34a-36a).

SUMMARY OF ARGUMENT

I.

A. Although Article III of the Constitution provides that judges of courts constituted thereunder must be accorded life tenure and protection against salary diminution, Congress retains substantial flexibility in determining the forum of decision for cases falling within the judicial power of the United States as defined in Article III. Congress may withhold elements of this jurisdiction from the lower federal courts, leaving those cases to be decided by state courts composed of judges who lack Article III salary and tenure guarantees. In addition, pursuant to its enumerated Article I powers, Congress may establish legislative courts that have jurisdiction to decide cases to which the Article III judicial power of the United States extends. This Court has upheld the establishment of many such legislative courts, including territorial courts and courts dealing with specialized areas of law such as customs. Thus, it is well established that the plenary grants of power in Article I permit Congress to establish non-Article III tribunals in "specialized areas having particularized needs and warranting distinctive treatment." *Palmore* v. *United States*, 411 U.S. 389, 408 (1973).

B. Congress determined that an efficient bankruptcy system requires adjudication by specialized bankruptcy courts exercising plenary jurisdiction. Because of the need for special expertise and expedition in bankruptcy matters, it was clear to Congress that the primary responsibility for bankruptcy cases could not be vested in district judges. Rather, Congress concluded that specialized bankruptcy judges were necessary—a conclusion that the district court bench had implemented as a practical matter under

the prior system by delegating all bankruptcy cases to referees. Moreover, weighty considerations of efficiency pointed toward preserving the Article I status of these judges. This approach prevented an influx of an unusually large number of specialized judges into the Article III judiciary and, more importantly, enabled Congress to retain flexibility to modify the system should the need for specialized judges decline at some future time. Thus, under the *Palmore* standard, Congress plainly had authority to establish Article I courts in the specialized area of bankruptcy.

Congress also determined that an essential feature of bankruptcy reform was the elimination of the previously recognized distinction between "summary" and "plenary" jurisdiction. The difficulty in drawing a clear line between summary and plenary controversies had led in the past to burdensome and wasteful litigation to determine whether the bankruptcy court had jurisdiction of a particular case. Moreover, the existing system had introduced serious delays into bankruptcy proceedings because of the crowded dockets of non-bankruptcy courts. Forcing trustees to litigate claims in various distant forums had subjected estates to significant expenses that sometimes induced trustees to forego litigation to recover assets to which estates were entitled. All of these factors combined to hamper bankruptcy trustees in their efforts to marshal the assets of the estate with reasonable expedition.

Because of the need for a specialized bankruptcy court and the need to have all bankruptcy-related cases consolidated in one court, Congress properly provided that the Article I bankruptcy court may exercise plenary jurisdiction over cases of a type that

could be heard in an Article III court if they were not bankruptcy-related. It is well settled that Congress may rely on the status of a party, such as the bankruptcy trustee, in conferring jurisdiction on a particular tribunal. See, *e.g.*, *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). Moreover, the vesting of plenary jurisdiction in the bankruptcy court clearly is appropriate by analogy to principles of pendent jurisdiction. Indeed, this Court previously has recognized the applicability of these principles in the present context. It repeatedly has held that plenary state law suits involving a bankruptcy trustee may be heard in federal court even though, outside the bankruptcy context, there would be no basis for federal court jurisdiction. *Williams* v. *Austrian*, 331 U.S. 642 (1947); *Schumacher* v. *Beeler*, 293 U.S. 367 (1934).

C. The exercise of bankruptcy jurisdiction by bankruptcy courts is analogous to the performance of adjudicatory functions under federal laws by specialized administrative agencies. Because bankruptcy petitions seek a discharge of debts, a benefit that is conferred by the government, they have been recognized to be appropriate for adjudication by an agency. Indeed, many administrative agencies resolve similar cases, and hence the exercise of bankruptcy jurisdiction by an Article I tribunal is consonant with traditional allocations of authority within the federal government.

II.

A. Although the original House bill would have established the bankruptcy courts as independent bodies with full judicial powers, the Senate version that ultimately was enacted into law set up the bankruptcy courts as adjuncts to the district courts with limited powers. By following this approach

and modeling the new bankruptcy system upon the old referee system, Congress sought to remove any doubts as to the constitutionality of the statute. Congress' considered view on the constitutional issue is entitled to substantial deference.

Congress deliberately deleted certain contempt powers and the authority to enjoin other courts, which had been identified as characteristic attributes of judicial power, from the powers of the bankruptcy court. Bankruptcy jurisdiction was vested in the district court, and the exercise of that jurisdiction by the adjunct bankruptcy court was made subject to appeal as of right to an Article III court. Thus, viewed within the entire judicial framework set up by Congress, the bankruptcy court is primarily a factfinder, analogous to a special master. All legal questions considered by the bankruptcy court can be determined on appeal by an Article III court. In this context, the arrangement selected by Congress satisfies the requirements of Article III. See *Crowell* v. *Benson*, 285 U.S. 22 (1932).

B. The new bankruptcy system is no different for Article III purposes than the prior system, which operated for many years without constitutional challenge under rules promulgated by this Court. Under the prior system, almost all bankruptcy cases were automatically referred to the bankruptcy judge and were decided by him unless the district court elected to withdraw the case from the referee—a power that almost never was exercised and that was totally beyond the control of the parties. The jurisdiction and powers of the predecessor bankruptcy judges were essentially the same as those of the new bankruptcy courts. The one exception is the extension of mandatory plenary jurisdiction to the new bankruptcy courts. But the predecessor bankruptcy courts adjudicated the same plenary cases by consent of the parties, and this Court

held that such cases properly could be decided by an Article I referee. *MacDonald* v. *Plymouth County Trust Co.*, 286 U.S. 263 (1932). Because a defect in subject matter jurisdiction could not have been waived by the parties, the presence of consent in such cases is irrelevant to the Article III analysis. Accordingly, the adjunct system established by the Bankruptcy Act of 1978, just like the predecessor system of adjudication through referees, complies in all respects with the requirements of Article III.

ARGUMENT

THE JURISDICTIONAL SCHEME OF THE BANKRUPTCY REFORM ACT OF 1978 DOES NOT VIOLATE THE CONSTITUTIONAL REQUIREMENTS OF ARTICLE III

After giving full consideration to the relevant constitutional issues, Congress in 1978 reformed the nation's system for adjudicating bankruptcy proceedings. A salient feature of this reform was centralization of jurisdiction over all controversies affecting the property of the bankrupt estate in one court, and Congress specified that the bankruptcy court should exercise that jurisdiction. Although bankruptcy judges are not guaranteed life tenure and protection against salary diminution, two independent grounds support Congress' determination that this jurisdictional scheme comports with the requirements of Article III. First, in order to meet a particularized need in the specialized area of bankruptcy law, Congress is empowered under Article I to establish "legislative courts" to adjudicate bankruptcy-related controversies. Second, even assuming that some of the questions that fall within the jurisdiction exercised by bankruptcy courts must be decided by an Article III

court, the system established by Congress, in which bankruptcy courts exercise limited powers as adjuncts of an Article III court, fully satisfies the requirements of Article III.

I. PURSUANT TO ITS ARTICLE I BANKRUPTCY POWER, CONGRESS IS EMPOWERED TO ESTABLISH LEGISLATIVE COURTS TO ADJUDICATE BANKRUPTCY-RELATED CONTROVERSIES

A. Legislative Courts Constituted Under Article I May Exercise Judicial Power In Areas Requiring Specialized Treatment

1. Article III, Section 1 of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." It further provides that the judges of these courts shall serve "during good Behaviour" and that compensation shall not be diminished during their tenure. Article I, Section 8, Clause 9, provides that "Congress shall have Power * * * [t]o constitute Tribunals inferior to the supreme Court." Article III, Section 2 states that this "judicial Power shall extend" to various classes of cases, including those "arising under * * * the Laws of the United States."

Congress retains substantial flexibility within this general framework. It is entirely within Congress' discretion whether to establish any inferior federal courts at all. See *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 551 (1962) (opinion of Harlan, J.). And, when inferior federal courts are constituted under Article III, Congress need not vest those courts with all of the jurisdiction to which the judicial power of the United States extends. *Cary* v. *Curtis*, 44 U.S. (3

How.) 236, 245 (1845). Indeed, prior to 1875, Congress declined to confer general federal question jurisdiction on the lower federal courts. See generally *Palmore* v. *United States*, 411 U.S. 389, 400-402 (1973).

The corollary of this Congressional power to withhold Article III jurisdiction from the inferior federal courts is that Congress may leave to state courts the decision of cases that fall within the Article III judicial power, even though those state courts are not Article III courts—*i.e.*, courts composed of judges with salary protection and life tenure. Thus, prior to 1875, the general federal question jurisdiction of cases "arising under * * * the laws of the United States" necessarily was exercised by non-Article III state courts. Even today, complaints asserting federally-created rights, with few exceptions, may be heard by state courts (see *Testa* v. *Katt*, 330 U.S. 386 (1947)), and the diversity jurisdiction specified in Article III must be exercised by state courts if the amount in controversy is less than $10,000. See 28 U.S.C. 1332.

Congress' authority to allocate cases falling within the federal judicial power is not limited to a choice between establishing Article III courts to adjudicate federal questions or delegating that task to existing state courts. Since the earliest days of the Republic, this Court has approved the creation by Congress of "legislative courts" pursuant to its Article I powers. In *American Insurance Co.* v. *Canter*, 26 U.S. (1 Pet.) 511 (1828), the Court sustained the creation of non-Article III territorial courts pursuant to Congress' Article I power to make rules respecting the territories of the United States. Subsequently, this Court sustained Congress' exercise of other Article I powers to create a wide variety of specialized Article

I courts. See, *e.g.*, *Palmore* v. *United States*, *supra* (District of Columbia local courts); *Williams* v. *United States*, 289 U.S. 553 (1933) (Court of Claims); *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929) (customs courts);[9] *United States* v. *Coe*, 155 U.S. 76 (1894) (Territorial Court of Private Land Claims); *In re Ross*, 140 U.S. 453, 464-465, 480 (1891) (consular courts); *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1857) (military courts).[10] As this Court explained in *Ex parte Bakelite Corp.*, *supra*, 279 U.S. at 449:

> * * * it has long been settled that Article III does not express the full authority of Congress to create courts and that other Articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution. * * * [T]hose [courts] created by Congress in the exertion of other powers are called legislative courts.

See generally 1 *Moore's Federal Practice* ¶ 0.4, at 61-80 (1981).

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[9] In *Glidden Co.* v. *Zdanok*, *supra*, this Court concluded that, in light of supervening legislation in which Congress declared the Court of Customs and Patent Appeals and the Court of Claims to be established under Article III, the judges of those courts are now "Article III judges" with constitutionally guaranteed salary protection and tenure.

[10] The Tax Court also has been established as an Article I court. See 26 U.S.C. 7441. The constitutionality of the Tax Court has been upheld repeatedly, although the issue has not been presented to this Court. See *Continental Equities, Inc.* v. *Commissioner*, 551 F.2d 74 (5th Cir. 1977); *Hartman* v. *Switzer*, 376 F. Supp. 486, 490 (W.D. Pa. 1974); *Burns, Stix Friedman & Co.* v. *Commissioner*, 57 T.C. 392 (1971).

These courts have been called "legislative courts" because they are created pursuant to Congress' legislative power under Article I. But there is little doubt that such courts may exercise jurisdiction over matters that come within the judicial power of the United States as specified in Article III. See generally P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 396-397 (2d ed. 1973) (hereinafter cited as *"Hart and Wechsler"*); H.R. Rep. No. 95-595, *supra*, at 66-67 (letter of E. Griswold); *id.* at 79-80 (letter of T. Sandalow); *id.* at 83 (letter of D. Shapiro); *id.* at 85-86 (letter of H. Wechsler); Plumb, *The Tax Recommendations of the Commission on the Bankruptcy Laws: Tax Procedures*, 88 Harv. L. Rev. 1360, 1462-1463 (1975). In light of the absence of an opinion for the Court in some of the most recent cases concerning Article I courts, those cases do not contain a simple statement of this proposition by a majority of the Court. But an analysis of the opinions in both *Glidden Co.* v. *Zdanok*, *supra*, and *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582 (1949), reveals that in both cases a majority of the Court apparently agreed on the general proposition that Article III jurisdiction can be conferred on Article I courts. See 2A *Collier on Bankruptcy* ¶¶ 2.01, 2.08 at, 2-15, 2-20 (15th ed. 1980); Broude, *The Referee in Bankruptcy as an Article I Judge: A Reply to Mr. Bondurant*, 46 Am. Bankr. L. J. 39, 46, 51 (1972).

A review of the holdings of this Court strongly supports that conclusion. Thus, it is well established that territorial courts created under Article I may exercise jurisdiction over federal questions that also fall within the jurisdiction of courts created under Ar-

ticle III. See *Glidden Co.* v. *Zdanok*, *supra*, 370 U.S. at 545 n.13 (opinion of Harlan, J.) and cases cited therein. Similarly, while the Court of Claims and Court of Customs and Patent Appeals are now considered Article III courts (see note 9, *supra*), they exercised jurisdiction over questions falling within the federal judicial power even when this Court was of the view that they (or their predecessors) were Article I courts (see *Williams* v. *United States*, *supra*; *Ex parte Bakelite Corp.*, *supra*). By the same token, local courts in the District of Columbia that are created under Article I (see *Palmore* v. *United States*, *supra*) exercise jurisdiction that formerly was exercised by Article III courts (see *O'Donoghue* v. *United States*, 289 U.S. 516 (1933)). Indeed, the fact that this Court exercises appellate jurisdiction to review decisions of legislative courts clearly demonstrates that those courts are capable of rendering judgments in cases raising questions falling within the Article III judicial power. See *Glidden Co.* v. *Zdanok*, *supra*, 370 U.S. at 545 n.13 (opinion of Harlan, J.); *Hart and Wechsler*, *supra*, at 397.[11] Thus, the mere fact that Congress has given bankruptcy courts jurisdiction over cases that fall within the Article III power of federal courts does not mean that bankruptcy courts cannot properly be established under Article I of the Constitution.[12]

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[11] This Court also has recognized that cases pending in an Article I territorial court may be transferred to an Article III court when the territory is admitted to statehood. See *Baker* v. *Morton*, 79 U.S. (12 Wall.) 150, 153 (1870).

[12] Indeed, the bankruptcy jurisdiction is so closely tied to an Article I power that three justices in *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, *supra*, took the position that bankruptcy cases arise only under Article I. See 337 U.S. at 594-599 (opinion of Jackson, J.).

2. The question remains whether Congress' establishment of Article I bankruptcy courts exceeds the limitations on its power to constitute legislative courts. The district court held that it does, explaining (J.S. App. 17a-23a) that Congress' power to establish Article I courts is limited to situations in which Congress legislates for a discrete geographical area over which it has constitutional authority, or in which the jurisdiction of the newly created courts extends only to claims brought against the federal government, such as customs disputes. See also Motion to Affirm 14-16. But there is no constitutional principle that warrants singling out these two situations from others in which Congress also has plenary authority to legislate, or for classifying them as the only ones in which Article I courts may exercise jurisdiction over cases falling within Article III.

Certainly the concern that underlay the tenure and salary protections of Article III—preventing undue governmental pressure on federal judges (see *The Federalist* Nos. 78-79 (A. Hamilton) (J. Cooke ed. 1961))—suggests no basis for such a distinction. The District of Columbia and territorial courts hear the same kinds of cases, involving suits between private litigants, as do Article III inferior federal courts, and litigants in these geographical areas have an equivalent interest in having their disputes resolved by a tribunal that is free from outside pressures.[13] In-

[13] It has been suggested that the "transitory" nature of territorial courts pending statehood supports a special exception for them from the requirements of Article III. *Glidden Co.* v. *Zdanok, supra*, 370 U.S. at 546-547 (opinion of Harlan, J.). But that theory is not an adequate explanation in light of the validity of Article I courts in the District of Columbia (*Palmore* v. *United States, supra*), whose non-state status cannot be said to be transitory. Moreover, territorial courts

deed, the situation in which suits are brought against the United States, as in the Court of Claims, presents the most compelling case of all for taking precautions to insulate a court from potential government pressures, yet it is undisputed that such courts have been recognized as valid Article I courts. Moreover, the district court's suggested restriction on the power of Congress to invest Article I tribunals with Article III jurisdiction takes no account of the numerous specialized administrative agencies, such as the Interstate Commerce Commission, that perform adjudicatory functions under the laws of the United States. See generally pages 33-36, *infra*. Thus, it is apparent that Congress' authority to establish legislative courts in the exercise of its Article I powers is not limited to territorial courts or courts that determine the validity of claims against the government. Nothing in the language of the Constitution or the decisions of this Court suggests such an artificial limitation on Congress' broad powers under Article I.

3. Prior to 1973, the state of the law concerning Congress' authority to establish Article I courts was somewhat confused because of the inability of a majority of the Justices to agree upon an opinion for the court in *Glidden Co.* v. *Zdanok*, *supra*, and *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, *supra*, and because there were instances in which the same court performing the same functions had been recognized as an Article I court at one time and

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are recognized as proper Article I courts without regard for the likelihood that the territories may soon be admitted to statehood. See, *e.g.*, C.Z. Code tit. 3, § 141 (1963); 37 Stat. 565 (district court for the Canal Zone District set up since 1912 as legislative court with judges who serve fixed terms).

as an Article III court at a later time (see note 9, *supra*). In *Palmore* v. *United States*, *supra*, however, eight members of the Court joined in an opinion that established additional standards for delineating Congress' power to create Article I courts. The Court there upheld Congress' decision to vest in Article I courts exclusive jurisdiction of both criminal and civil cases arising under District of Columbia laws. While recognizing the importance of the tenure and salary protections of Article III, the *Palmore* Court noted that it was by now well established that "practical considerations" support Congress' creation of specialized Article I courts to achieve important legislative objectives (411 U.S. at 404). Specifically, the Court stated that the protections prescribed in Article III "must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." Id. at 408.[14] In light of the crisis in the District of Columbia court system that Congress faced, the Court concluded that the need "to relieve the regular Art. III courts * * * from the smothering responsibility for the great mass of [local District of Columbia]

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[14] The district court suggested (J.S. App. 22a-23a) that this Court's reference in *Palmore* to "specialized areas" limits Congress' power to create Article I courts to discrete geographical areas. That interpretation, however, cannot be squared with the fact that the *Palmore* formulation covered courts such as the Court of Claims, the Customs Court, and military courts—courts which are not specialized in a geographical sense. Significantly, the majority of constitutional scholars who addressed this point in response to Congress' solicitation of their views did not accept the interpretation that *Palmore* was so limited. See H.R. Rep. No. 95-595, *supra*, at 66-67, 78, 80, 82, 86 (letters of E. Griswold, T. Sandalow, P. Mishkin, D. Shapiro, and H. Wechsler).

litigation" justified the creation of a new Article I court. *Id.* at 408-409.

Thus, while *Palmore* does not necessarily define the limits of Congress' power to establish legislative courts, it makes clear that, at a minimum, Congress may establish such courts in furtherance of a specific Article I power when there is a particularized need for a specialized court. Of course, this formulation does not necessarily mean that Article III places no constraints on Congress' power to create inferior federal courts.[15] First, *Palmore* authorizes the creation of legislative courts only pursuant to a specific Article I power. Thus, for example, it provides no basis for an Article I court to exercise the federal diversity jurisdiction that is specified in Article III but has no counterpart in Article I. Second, the power to create specialized Article I courts does not mean that Congress can replace the independent Article III inferior federal judiciary by a wholesale assignment of federal judicial business to legislative

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[15] We note, however, that this Court has never invalidated on Article III grounds an Act of Congress establishing a non-Article III tribunal to adjudicate legal claims. And there is room to doubt whether Article III imposes *any* additional restraints on Congress' power in this regard that are not contained in other provisions of the Constitution. Justice Brandeis has observed:

> If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal district courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process.

Crowell v. *Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting). See also *Hart and Wechsler, supra*, at 396.

courts. See *Hart and Wechsler, supra*, at 396. Cf. *O'Donoghue* v. *United States, supra*, 289 U.S. at 530-531. Finally, even pursuant to an Article I power, Congress can establish a specialized Article I court to exercise Article III jurisdiction only when there is a particularized need for distinctive treatment of the matters assigned to that court, as found in *Palmore*.

The precise limits of congressional power in the first two situations described above need not be explored here. There can be no serious claim that the establishment of bankruptcy courts by the Bankruptcy Act of 1978 is an attempt to supersede the system of lower federal courts that exercise Article III jurisdiction. Moreover, there is no doubt that the Act is an exercise of Congress' power under Article I, Section 8, Clause 4, of the Constitution to enact "[l]aws on the subject of Bankruptcies." See, *e.g.*, *United States* v. *Kras*, 409 U.S. 434, 447 (1973).[16] Hence, under the *Palmore* rationale, the establishment of these courts as Article I courts does not violate Article III if there is a particularized need for distinctive treatment.

B. Congress Correctly Found That There Existed A Particularized Need For A Specialized Bankruptcy Court Exercising Plenary Jurisdiction

1. *An Efficient Bankruptcy System Requires Adjudication By Specialized Judges*

In analyzing the need for reform of the Nation's bankruptcy system, Congress noted that "the most

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[16] Article I broadly authorizes Congress to enact laws on the subject of bankruptcies and to adopt any related legislation that is "necessary and proper" to achieve its objectives. See Article I, Section 8, Clause 18.

severe problem in the bankruptcy administration was the court system." H.R. Rep. No. 95-595, *supra*, at 4. See also Commission Report, *supra*, at 4-7. Because of the dramatic increase in the number of bankruptcy petitions filed in recent years, the "great stresses and strains" on the existing bankruptcy court system created a judicial crisis analogous to that which Congress and the Court confronted in *Palmore*. See 124 Cong. Rec. 28258 (1978) (statement of Sen. DeConcini).[17] As a major element of the reform of this court system, Congress determined that it was necessary to create a new bankruptcy court with increased independence from the district court, which could efficiently resolve the myriad legal controversies that encumber and protract federal bankruptcy proceedings. This concept received almost universal support from those who advised Congress on the need for new bankruptcy legislation. H.R. Rep. No. 95-595, *supra*, at 18. See also S. Rep. No. 95-989, *supra*, at 15-16; Commission Report, *supra*, at 85-96.

Congress fully realized that the bankruptcy system would be threatened with collapse if the primary judicial responsibilities for bankruptcy proceedings were vested in the existing district courts. Because the district courts already were overburdened by their caseload—the criminal portion of which would have to be given precedence over bankruptcy matters because of the Speedy Trial Act, 18 U.S.C. (& Supp. III) 3161 *et seq.*—Congress recognized that bankruptcy matters would not receive the "expeditious disposition" they require if they were handled by

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[17] The number of bankruptcy cases filed annually increased steadily from 10,000 to over 254,000 between 1945 and 1975. H.R. Rep. No. 95-595, *supra*, at 21.

the district courts. H.R. Rep. No. 95-595, *supra*, at 14. Indeed, in light of the testimony before the Commission concerning district court judges' "lack of interest in bankruptcy matters," Congress feared that bankruptcy cases would be placed at the bottom of district court calendars. *Id.* at 14 & n.88. Moreover, Congress found that the bankruptcy area had "become too specialized and require[d] too much expertise to be able to be handled on an ad hoc basis by a generalist" (*id.* at 9); "a generalist judge that only occasionally handled bankruptcy cases would not have a sufficient understanding of the law and the fact situations that arise * * * [to be able] to make the quick decisions that these cases so often require." *Id.* at 15. Thus, it was clear to Congress that the new statute would have to provide that bankruptcy cases be handled primarily by a specialized group of judges—a conclusion that already had been reached by the district court bench under the prior system of bankruptcy administration, which, as a practical matter, left all bankruptcy matters to the predecessor bankruptcy judges and referees. See *id.* at 9.

Congress also determined that considerations of efficiency required continued recognition of bankruptcy judges as Article I judges with fixed terms of service. Cf. *Palmore* v. *United States*, *supra*, 411 U.S. at 408-409. Congress found that dislocations associated with the evolution of the existing referee system into a body of Article I judges operating as a more independent adjunct of the district court would be minimal as compared to those that would occur if a separate, Article III bankruptcy system were constituted. S. Rep. No. 95-989, *supra*, at 16. The unusually large number of bankruptcy judges to be established under the Act would certainly have caused imbalances in the federal judiciary if their

status had been converted to that of Article III judges. Indeed, the size of the bankruptcy judiciary dwarfs that of other specialized courts, like the Court of Claims, that Congress previously has decided to establish as Article III courts.[18]

Moreover, and particularly because of this large number of judges, it was important for Congress to vest responsibility for bankruptcy matters in judges without life tenure in order to retain sufficient flexibility to modify the system should the need for these highly specialized bankruptcy judges diminish at some future time, either because of legislative changes or altered economic conditions. See H.R. Rep. No. 95-595, *supra*, at 83 (letter of D. Shapiro). Cf. *Glidden Co.* v. *Zdanok*, *supra*, 370 U.S. at 546-547 (opinion of Harlan, J.) (transitory nature of courts recognized as reason for making them legislative courts).[19] If bankruptcy judges were given life tenure and the need for such judges sharply declined at some future time, either the judges would be forced to sit idle or Congress would have to reassign them outside their specialty to another Article III court—results that would be impractical and wasteful. Finally, the establishment of bankruptcy judges as Article I judges was supported by the long tradition of adjudication of bankruptcy matters by referees. As Congress noted, referees serving fixed terms

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[18] At the time Congress was considering the Bankruptcy Act, there were 190 full-time and 30 part-time bankruptcy judges serving in office. H.R. Rep. No. 95-595, *supra*, at 9.

[19] Congress noted that in the past, there have been periods of downward fluctuation in the number of bankruptcies (H.R. Rep. No. 95-595, *supra*, at 21). Of course, it was impossible to predict with accuracy how the 1978 legislation would affect the number of filings.

have long functioned as "a de facto specialized court system within the district courts." H.R. Rep. No. 95-595, *supra*, at 9. In these circumstances, there can be little doubt that, under the *Palmore* standard, Congress had ample authority to establish the bankruptcy courts as Article I tribunals.[20]

2. *An Essential Element of an Efficient Bankruptcy System is the Vesting of Plenary Jurisdiction in the Bankruptcy Court*

a. The legislative record shows almost universal agreement that elimination of the distinction between summary and plenary jurisdiction is an essential feature of bankruptcy reform. The House Report noted that both the Commission Report and numerous witnesses who testified at the House Hearings had argued in favor of eliminating this jurisdictional distinction, and the Report concluded that such a change was "essential to a healthy bankruptcy system." H.R. Rep. No. 95-595, *supra*, at 48. The Senate Report characterized this change as "[a] major impetus" underlying the reform legislation "in order to eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction, a wasteful remnant of the referee system left over from the pre-

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[20] Indeed, even Mr. Plumb, who believed that some aspects of the Commission's proposed bankruptcy legislation could violate Article III, and whose views prompted the House to solicit the opinions of constitutional scholars on the subject (see H.R. Rep. No. 95-595, *supra*, at 64), concluded that "the matters constituting 'proceedings in bankruptcy'" that previously had been delegated to referees undoubtedly could be assigned to legislative courts. Plumb, *The Tax Recommendations of the Commission*, *supra*, 88 Harv. L. Rev. at 1464.

Chandler Act era." S. Rep. No. 95-989, *supra*, at 17. Accordingly, the Bankruptcy Act of 1978 provides that, in conjunction with performing their primary responsibility to adjudicate the underlying bankruptcy petition, the bankruptcy courts may exercise jurisdiction over "all civil proceedings * * * arising in or related to cases under title 11." 28 U.S.C. (Supp. III) 1471(b). Thus, Congress gave the bankruptcy courts jurisdiction over all cases affecting the property of the estate, *i.e.*, the debtor's assets or liabilities, even though these cases sometimes could involve other than pure bankruptcy controversies.[21]

The Commission Report explained in detail why the existing division of jurisdiction between bankruptcy courts and non-bankruptcy courts was unworkable (Commission Report, *supra*, at 88-92), and this analysis was adopted by Congress and reprinted in full in the House Report. H.R. Rep. No. 95-595, *supra*, at 43-48. First, the Commission noted that the division of jurisdiction inevitably introduced delay into the bankruptcy process because "the dockets

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[21] Adjudication of plenary suits could be expected to represent a minor portion of the bankruptcy court's business. The number of individual bankruptcies exceeds the number of business bankruptcies by a ratio of more than 12 to 1. D. Stanley & M. Girth, *Bankruptcy, Problem-Process-Reform* 2 (The Brookings Institution, 1971). These individual proceedings are generally less complex than business bankruptcies and less likely to involve a significant number of plenary suits that would be brought within the bankruptcy court's jurisdiction by Section 1471(c). The House Committee stated that "few cases" would be added to the bankruptcy court's load by this expansion of jurisdiction, noting the Judicial Conference's estimate that it would be less than 600 cases annually. *Report on Hearings on the Court Administrative Structure for Bankruptcy Courts of the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. (Comm. Print No. 13, 1978).

of the non-bankruptcy courts are likely to be more crowded and commencement of the trials more likely to be postponed in such courts than in bankruptcy courts." *Id.* at 45. This Court has long recognized the importance of minimizing delay in bankruptcy proceedings, noting that "a chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period.'" *Katchen* v. *Landy*, 382 U.S. 323, 328 (1966), quoting *Ex parte Christy*, 44 U.S. (3 How.) 292, 312 (1845). As the Commission explained, such delay is intolerable "because of the prejudicial effect it might have on prospects for rehabilitating an enterprise in financial distress and the aggravated risk of deterioration of the estate in the course of liquidation." H.R. Rep. No. 95-595, *supra*, at 45 (footnote omitted).

Second, the Commission pointed to the significant additional expenses incurred by the estate of the debtor when it is forced to litigate in distant forums outside the bankruptcy court. The Commission found that in the past "trustees have often foregone litigation to recover assets of estates because of the potential expense and other difficulties of litigating in distant courts, having limited resources with which to wage such litigation." H.R. Rep. No. 95-595, *supra*, at 45. See also *Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 145 (1975) (testimony of Bankruptcy Judge Copenhaver).

The Commission found the most serious problem with the division of jurisdiction to be "the frequent, time-consuming, and expensive litigation of the question whether the bankruptcy court has jurisdiction of a particular proceeding." H.R. Rep. No. 95-595

supra, at 45. The source of this burdensome litigation is the practical difficulty in drawing a clear line between summary and plenary jurisdiction; the distinction has been called "one of the most involved and controversial questions in the entire field of bankruptcy." See H.R. Rep. No. 95-595, *supra*, at 45, quoting MacLachlan, *Bankruptcy* § 24 (1956). In the words of the Senate Report, "the jurisdictional limitations presently imposed on the bankruptcy courts have embroiled the court and the parties in voluminous litigation whose sole function is to determine whether the court possesses the requisite summary jurisdiction to determine the merits of issues often necessarily heard by the court in determining its jurisdictional question." S. Rep. No. 95-989, *supra*, at 17.

The Commission concluded that each of these factors operated to hamper the trustee in marshalling the assets of the estate:

> Generally, time is on the side of the defendant. If he can subject the plaintiff trustee to the necessity of suing in another court, he can gain the additional time which that necessity imposes on the trustee. Similarly, the extra expense entailed by the estate when the trustee is forced to sue elsewhere gives his adversary a counter for bargaining with him. Even when the trustee is likely to prevail in a contest over whether the bankruptcy court has jurisdiction, the adversary by merely litigating the issue of jurisdiction may gain most of the advantages he would get if he won on the jurisdictional issue, *viz.*, time and bargaining leverage against the trustee. Thus, the adversary has a strong incentive to press his jurisdictional objections to the bankruptcy court's jurisdiction up through the appellate courts.

H.R. Rep. No. 95-595, *supra*, at 46. In view of these findings, Congress had a rational basis for determining that there was a strong need to invest the specialized bankruptcy courts with plenary bankruptcy jurisdiction.

b. Of course, it is quite true that, by virtue of 28 U.S.C. (Supp. III) 1471(c), some cases will be heard in bankruptcy courts even though the same cases would be heard in an Article III court if a bankrupt estate were not one of the parties. This result, however, presents no difficulty under Article III. It is quite common in our judicial system for a tribunal to exercise jurisdiction over a case based on the identity of one of the parties to the dispute. See, *e.g.*, 28 U.S.C. 1442(a)(1); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 475 n.5 (1957) (Frankfurter, J., dissenting); *Maryland* v. *Soper*, 270 U.S. 9, 32 (1926); *Pacific Railroad Removal Cases*, 115 U.S. 1, 11-14 (1885); *Tennessee* v. *Davis*, 100 U.S. 257, 260-266 (1879). *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824); Mishkin, *The Federal "Question" in the District Courts*, 53 Col. L. Rev. 157, 193 (1953).

Moreover, the exercise of plenary jurisdiction by bankruptcy courts is analytically similar to an exercise of pendent jurisdiction. Just as a federal court constitutionally may exercise jurisdiction over a state law claim because of its relationship to a federal claim within the federal question jurisdiction of the court (*United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966)), so a specialized bankruptcy court may exercise jurisdiction over a non-bankruptcy case involving the property of the estate because resolution of that case is closely intertwined with the ultimate resolution of the pending bankruptcy proceeding. See H.R. Rep. No. 95-595, *supra*, at 81 (letter of T. Sandalow). See

also *Rosado* v. *Wyman*, 397 U.S. 397, 402-405 (1970); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 380-381 (1959).

Of particular relevance here is the fact that a federal bankruptcy court may assume jurisdiction of a plenary suit brought under state law by a trustee in bankruptcy. The Bankruptcy Act of 1898 divested the bankruptcy courts of jurisdiction over plenary suits brought by the trustee, but it permitted the court to continue to hear such suits by consent (see page 44, *infra*). In *Schumacher* v. *Beeler*, 293 U.S. 367 (1934), this Court held that the exercise of jurisdiction by the federal courts over such suits was constitutional. The Court stated: "The Congress, by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction to entertain such suits and could prescribe the conditions upon which the federal courts shall have jurisdiction." *Id.* at 374. See also *Williams* v. *Austrian*, 331 U.S. 642 (1947); *Lathrop* v. *Drake*, 91 U.S. 516, 518 (1875). Thus, this Court has recognized that the connection between plenary suits and the underlying bankruptcy proceeding is sufficiently strong to provide a basis for federal bankruptcy court jurisdiction over plenary suits that, outside the bankruptcy context, would be heard in state court. See generally *Textile Workers Union* v. *Lincoln Mills*, *supra*, 353 U.S. at 483 (Frankfurter, J., dissenting). In light of Congress' recent determination that considerations of fairness and efficiency demand that summary and plenary suits be heard in the same court, there is a compelling reason for applying the principle of *Schumacher* here and permitting an Article I bankruptcy court to exercise jurisdiction over a plenary suit that, outside the bankruptcy context, would be heard in an Article III court. See generally, P. Bator,

P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 90-91 (2d ed. Supp. 1977).[22]

C. Bankruptcy Courts Exercise Power Analogous To The Adjudicatory Power Exercised By Certain Administrative Agencies

For many years, numerous executive and independent administrative agencies have performed adjudicatory functions in the exercise of their specialized statutory responsibilities. Indeed, the Administrative Procedure Act contains a special section devoted to adjudicative procedures. 5 U.S.C. 554. Because these agencies adjudicate matters that arise under federal laws—for example, deportation proceedings conducted by the Immigration and Naturalization Service as a delegate of the Attorney General (see 8 U.S.C. 1251-1254)—many of them perform functions that Congress could have chosen to commit to Article III courts. Congress' decision to vest bankruptcy jurisdiction in legislative courts is analogous to its conferral of adjudicative functions on these agencies.

To be sure, matters adjudicated by agencies often relate to "public rights" created by a particular statute and generally involve the government taking a position as a representative of the public. Cf. *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission*, 430 U.S. 442, 455 (1977). Bankruptcy proceedings primarily concern the relationship

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[22] To the extent that the new Bankruptcy Act gives the bankruptcy courts jurisdiction over plenary suits that would otherwise be heard in *state* court (see *Schumacher* v. *Beeler*, *supra*) any Article III objection is insubstantial because the suits would in any event be heard in a non-Article III court.

between an insolvent debtor and his creditors. See *Wright* v. *Union Central Life Insurance Co.*, 304 U.S. 502, 513-514 (1938); *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry.*, 294 U.S. 648, 667-675 (1935). But bankruptcy proceedings involve the conferral of a public benefit and implicate the public interest in a way that ordinary suits between private litigants do not. This Court has noted that the bankruptcy statute "is something more than another mode of transferring property *in invitum*. It is a gift of privileges and expresses the conditions upon which they are conferred." *Page* v. *Edmunds*, 187 U.S. 596, 605 (1903). Moreover, "[t]he determination of the *status* of the honest and unfortunate debtor by his liberation from encumbrance on future exertion is matter of public concern." *Hanover National Bank* v. *Moyses*, 186 U.S. 181, 192 (1902).

The discharge in bankruptcy of a debtor's obligations is unquestionably a benefit conferred by the government. Just as non-Article III administrative agencies constitutionally may grant government benefits such as radio station licenses, pilot licenses, or certificates for common carriers, an administrative agency could be established to adjudicate bankruptcy petitions and grant discharges. Indeed, a recent study recommended that bankruptcy cases be delegated to an administrative agency (see D. Stanley & M. Girth, *Bankruptcy, Problem-Process-Reform* 4, 196-218 (The Brookings Institution, 1971)), and this Court has stated that there would be no constitutional bar to that course of action. *United States* v. *Kras*, *supra*, 409 U.S. at 447. See also Commission Report, *supra*, at 85, 98 n.9 (noting remarks of Chief Justice Warren).

Plenary suits, of course, involve disputes between private parties, but the fact that Congress deemed it necessary to have those disputes resolved in bankruptcy courts does not weaken the comparison to the work of administrative agencies. In carrying out their public responsibilities, agencies frequently resolve disputes between private parties. The Federal Communications Commission, for example, may resolve disputes between private parties as to who is entitled to a license to operate a radio station and on what frequency. See, *e.g.*, *FCC* v. *National Broadcasting Co.*, 319 U.S. 239 (1943); *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940).[23] Likewise, the Department of Labor adjudicates disputes between private parties regarding federal workers' compensation claims. See 33 U.S.C. (& Supp. III) 919 and 921. In *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932), this Court specifically recognized that such claims involve "private right[s], that is, of the liability of one individual to another." Nonetheless, the Court concluded that the merits of such claims could be adjudicated by an administrative agency subject to judicial review, "thus relieving the courts of a most serious burden." *Id.* at 54. See also *Voehl* v. *Indemnity Insurance Co.*, 288 U.S. 162 (1933).[24]

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[23] The Copyright Royalty Tribunal (CRT) is a modern tribunal with substantial parallels to the bankruptcy court. Pursuant to 17 U.S.C. (& Supp. III) 115 and 116, users of certain copyright materials are required to pay a licensing fee, and the CRT distributes those fees to competing copyright owners. Thus, much like a bankruptcy court, the CRT is responsible for the marshalling and distribution of assets among competing private claimants.

[24] Of course, there may be some plenary suits that could not be heard before an agency, such as those in which the

Most significantly, this Court has specifically recognized that Congress may vest bankruptcy powers in non-tenured administrative agencies or officials. The Court has rejected an Article III challenge to the delegation by Congress of certain bankruptcy authority affecting the rights of debtors and creditors in railroad reorganizations. *Reconstruction Finance Corp.* v. *Bankers Trust Co.*, 318 U.S. 163, 168-171 (1943). See also *Ecker* v. *Western Pacific R.R.*, 318 U.S. 448 (1943). The Court also has held that the Comptroller of the Currency may, consistent with the Constitution, exercise his statutory role in the collection and distribution of the assets of an insolvent national bank (see 12 U.S.C 192-197). *In re Chetwood*, 165 U.S. 443, 457-458 (1897); *Bushnell* v. *Leland*, 164 U.S. 684 (1897). In sum, Congress' decision that bankruptcy jurisdiction be exercised by a non-tenured legislative court does not mark a sharp departure from other delegations of authority to government bodies created under Article I that adjudicate cases affecting the rights of private parties.

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litigants have a Seventh Amendment right to a jury trial. See *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission, supra.* But if the bulk of the cases in the bankruptcy court are cases that would appropriately be decided by an agency, it makes perfect sense to allow the Article I tribunal to hear all plenary suits, as long as the Seventh Amendment right is protected. See H.R. Rep. No. 95-595, *supra*, at 83 (letter of D. Shapiro).

II. BY VESTING BANKRUPTCY JURISDICTION IN THE DISTRICT COURTS AND PROVIDING FOR THE EXERCISE OF THAT JURISDICTION IN THE FIRST INSTANCE BY AN ADJUNCT TRIBUNAL WITH LIMITED POWERS, CONGRESS SATISFIED ANY CONSTITUTIONAL REQUIREMENT THAT BANKRUPTCY QUESTIONS BE DECIDED BY ARTICLE III COURTS

A. The district court concluded that the Bankruptcy Act of 1978 is unconstitutional because it "transferred Article III judicial power to an Article I tribunal"—the bankruptcy court (J.S. App. 17a). Even assuming arguendo that the Constitution requires that bankruptcy questions be determined by an Article III court, the district court reached the wrong result here because it isolated the bankruptcy court from the total judicial framework constructed by Congress. In fact, using the existing referee system as its model, Congress carefully subordinated bankruptcy courts to Article III tribunals in order to remove any possible constitutional objection.

The bill originally reported by the House Judiciary Committee would have established the bankruptcy courts as independent bodies with full judicial powers. The Committee recognized the option of establishing them as Article I courts, but for policy reasons (H.R. Rep. No. 95-595, *supra*, at 22-23), and to avoid constitutional questions (*id.* at 23-39), the bill as reported designated the bankruptcy judges as Article III judges. The House was divided on this issue, and initially the House bill was amended on the floor to retain the bankruptcy courts as Article I adjuncts to the district court. 123 Cong. Rec. 35692-35693 (1977). Ultimately, however, the House rejected this amendment and passed the bill in a form that conferred Article III status on the bankruptcy judges.

In contrast, the bill passed by the Senate limited the powers of the bankruptcy courts and established them as Article I adjuncts to the district court. See S. Rep. No. 95-989, *supra*, at 153-154. The House then accepted those changes in the compromise agreed to by the House and Senate managers.[25]

Thus, the Bankruptcy Act of 1978 did not establish completely independent bankruptcy courts as contemplated by the House bill. Instead, it created tribunals subject to the special limitations introduced by the Senate. The Act specifies that the new bankruptcy courts are "adjuncts" to the district court. 28 U.S.C. (Supp. III) 151. Both during and after the transition period, jurisdiction in bankruptcy cases and related civil actions is vested directly in the district courts, although exercise of that jurisdiction at the trial level has been delegated by statute to bankruptcy judges. 28 U.S.C. (Supp. III) 1471; Pub. L. No. 95-598, Section 405(a), 92 Stat. 2685. The Act also differs from the House bill in that it limits the contempt power of the bankruptcy judges and prohibits them from enjoining proceedings in other courts. 28 U.S.C. (Supp. III) 1481; Pub. L. No. 95-598, Section 405(a)(1), 92 Stat. 2685. This limitation was a direct response to the comments on the House bill by the Judicial Conference and several constitutional scholars that identified the conferral of these powers on the bankruptcy courts as raising constitutional problems not implicated by the mere estab-

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[25] In its amendment of the Senate version, the House changed the bankruptcy courts to adjuncts of the court of appeals (see 124 Cong. Rec. 32391 (1978) (statement of Rep. Butler)), but the Senate reinstated them as adjuncts of the district court (see 124 Cong. Rec. 34019 (1978) (statement of Sen. Thurmond)) in the final series of amendments to which the House agreed.

lishment of Article I courts to hear plenary bankruptcy cases. See Judicial Conference of the United States, *Second Preliminary Report of the Ad Hoc Committee on Bankruptcy Legislation* 10 (June 7, 1977); H.R. Rep. No. 95-595, *supra*, at 81, 84 (letters of T. Sandalow and D. Shapiro); see also *id.* at 86, 87 (letters of H. Wechsler and C. Wright).

In short, by eliminating some of the proposed changes from the old system in order to reduce the independence of the new bankruptcy courts, Congress intended to remove any constitutional objections to the new Bankruptcy Act. See S. Rep. No. 95-989, *supra*, at 16.[26] Congress complied with the literal

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[26] Congress' considered judgment that the Bankruptcy Act of 1978 satisfies Article III is entitled to substantial deference. To be sure, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). But it is also true that an act of Congress is presumptively constitutional and that that presumption is particularly strong where Congress has analyzed the constitutionality of a proposed statute in considerable detail. See, *e.g.*, *Rostker* v. *Goldberg*, No. 80-251 (June 25, 1981), slip op. 6; *Fullilove* v. *Klutznick*, 448 U.S. 448, 472-473 (1980) (opinion of Burger, C.J.); *Palmore* v. *United States*, *supra*, 411 U.S. at 409; *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964). See also *Glidden Co.* v. *Zdanok*, *supra*, 370 U.S. at 541-543 (opinion of Harlan, J.). Here, after consultation with various authorities and extended debate, Congress selected the present court structure. Both Attorney General Bell, on behalf of the Department of Justice, and Judge Aldisert, on behalf of the federal Judicial Conference, testified that they believed the Senate bill to be constitutional. *Hearings on S. 2266 and H.R. 8200 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 412-414, 544 (1977). In addition, the Commission on Bankruptcy Laws had reported to Congress that bankruptcy jurisdiction could be exercised by a non-Article III judge. See Commission Report, *supra*, at 91-92.

requirements of Article III by vesting jurisdiction of bankruptcy matters in the district court. And by constituting the bankruptcy courts as adjuncts with limited powers, Congress essentially set up a system that makes the bankruptcy judges the primary fact-finders but leaves the determination of the law in the hands of Article III judges.

In *Crowell* v. *Benson*, *supra*, this Court made clear that the requirements of Article III may be satisfied by a procedure in which an Article I tribunal acts as a factfinder subject to review by an Article III court. While recognizing that Article III defines the judicial power of the United States, the Court explained that "the extent of the power as well as the mode of proceeding * * * are subject to the regulation of Congress." 285 U.S. at 53. Specifically, "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." *Id.* at 51. Accordingly, the Court found that a non-Article III agency could make factual determinations under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. III) 901 *et seq.* By the same token, this Court customarily exercises its original jurisdiction by appointing special masters who need not be Article III judges, and the Court "regularly acts on the basis of the master's report and exceptions thereto." *United States* v. *Raddatz*, 447 U.S. 667, 683 n.11 (1980).

Here, both the findings of fact and conclusions of law of the adjunct bankruptcy court are reviewable as of right by an Article III court and, in some cases, by both the district court and the court of appeals. See 28 U.S.C. (Supp. III) 1293 and 1334; Pub. L. No. 95-598, Section 405(c), 92 Stat. 2685. The stat-

ute prescribes no particular standard of review. Presumably, the same standard would apply as under Bankruptcy Rule 810—findings of fact made by a bankruptcy judge must be accepted unless clearly erroneous. See Pub. L. No. 95-598, Section 405(d), 92 Stat. 2685. At least in a civil case, Article III clearly does not require a de novo standard of review. Cf. *United States* v. *Raddatz*, *supra*, 447 U.S. at 681-682. In *Crowell*, the Court recognized that deference would be given to the deputy commissioner's findings of fact, noting that "the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases." 285 U.S. at 54. Indeed, the Court's opinion suggested that, at least in civil cases, Article III is satisfied if appellate review by an Article III tribunal is available. *Id.* at 48-54. See also *United States* v. *Raddatz*, *supra*, 447 U.S. at 681-684; *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission*, *supra*, 430 U.S. at 455 n.13; *Swain* v. *Pressley*, 430 U.S. 372, 382 n.16 (1977); *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38 (1936).

B. Whether or not a right of appeal to an Article III tribunal always is sufficient to satisfy the requirements of Article III, it is clear that the particular adjunct system set up by Congress here does satisfy those requirements. That is so because the new Bankruptcy Act was modeled on the old referee system that had operated for many years without constitutional challenge under rules promulgated by this Court.[27] Of course, the Bankruptcy Act of 1978 made

[27] 28 U.S.C. 2075 provides the authority for promulgation of bankruptcy rules by this Court and specifies that, once those rules have taken effect, "[a]ll laws in conflict with such rules shall be of no further force or effect."

important changes that enlarged the jurisdiction of the bankruptcy courts and increased their independence, such as the provision for lengthy terms of service for bankruptcy judges with appointment by the President rather than by the district court. But for purposes of analysis under Article III, no material changes were made.

Under the old bankruptcy statute, the district courts were designated as the courts of bankruptcy (11 U.S.C. 1(10) and 11(a)), which had jurisdiction, *inter alia*, to "[a]djudge persons bankrupt * * *; [a]llow claims, disallow claims * * *; * * * [and] [c]ause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto * * *." 11 U.S.C. 11(a). The statute, however, also created the office of referee (11 U.S.C. 61-67), and the referee, later renamed "bankruptcy judge" (Bankruptcy Rule 901(7)), was included by statute within the definition of the bankruptcy court (11 U.S.C. 1(9)), because he exercised much of the judicial authority of that court. See *White* v. *Schloerb*, 178 U.S. 542 (1900). Section 22 of the old statute, 11 U.S.C. 45, and Bankruptcy Rule 102(a) required automatic reference of all bankruptcy cases (with limited exceptions) to bankruptcy judges, and "[t]hereafter all proceedings in the case [were to] be before the referee," with certain specified exceptions. Section 38 of the old Act, 11 U.S.C. 66, vested referees with jurisdiction to "make the adjudications or dismiss the petitions" referred to them; to "determine the dischargeability of debts, and render judgment thereon;" and to "perform such of the duties as are by this title conferred on courts of bankruptcies * * *." See generally 2A *Collier on Bankruptcy* ¶ 38, at 1391-1447 (14th ed. 1978).

Moreover, as under the 1978 Act, the district court retained power to enjoin other courts (11 U.S.C. 11(a)(15)) and to punish for contempt (11 U.S.C. 11(a)(16) and 69(b)) that was withheld from referees.

Thus, with the exception of the district court's power to withdraw a reference from the bankruptcy judge and act upon it itself (Bankruptcy Rule 102(b))—a power that was exercised only infrequently—the relationship between the district court and the bankruptcy court was no different under the old statute than it is under the new Bankruptcy Act. Moreover, the district court's power under prior law to withdraw a reference could not be invoked by the parties; it was solely within the discretion of the district court. Thus, for the vast majority of cases that automatically were referred to a non-tenured referee and never were withdrawn, the Article III analysis is the same under the old statute as under the new Act.

Pursuant to the broad powers described above, referees under the old Act heard the same bankruptcy matters that, if not referred to them, would have been heard by an Article III court and that now will be heard by the new bankruptcy judges. Moreover, the old referees decided "summary" disputes between the debtor and private parties involving a variety of factual and legal matters that, outside the bankruptcy context, would be appropriate for determination by an Article III judge. See, *e.g.*, *Katchen* v. *Landy*, *supra*; *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U.S. 426, 430-431 (1924); *Weidhorn* v. *Levy*, 253 U.S. 268, 271-272 (1920); *White* v. *Schloerb*, *supra*. "In short, wherever the bankruptcy court [could] act summarily respecting persons or property, the referee, upon gen-

eral reference, [could] do likewise unless specifically restricted by the Act or Bankruptcy Rules." 2A *Collier on Bankruptcy* ¶ 38.09, at 1432 (14th ed. 1978).[28] Of course, the referee's jurisdiction, like the bankruptcy court's jurisdiction, was limited to "summary" cases where the court had at least constructive possession of the property in dispute. But that fact is irrelevant to the Article III analysis. If Article III prohibited a bankruptcy referee from exercising jurisdiction over a particular suit, it is not apparent why that prohibition would disappear simply because the property involved was in the constructive possession of the court.

The significant jurisdictional change made by the Bankruptcy Act of 1978 was the vesting of plenary jurisdiction in the bankruptcy court. But this change did not mark an unprecedented departure from past practice. The jurisdictional grants under the Bankruptcy Acts of 1841 and 1867 were almost as extensive, permitting the bankruptcy court to hear matters related to bankruptcy proceedings even if there was no other basis for federal jurisdiction. See, *e.g.*, *Lathrop* v. *Drake*, *supra*; see generally Commission Report, *supra*, at 91-92, 100. And even after mandatory plenary jurisdiction was removed from the bankruptcy courts in 1898, plenary suits could still be heard in the bankruptcy courts with the consent of the parties. See 11 U.S.C. 11(a)(7); Bankruptcy Rule 915(a); *Schumacher* v. *Beeler*, *supra*, 293 U.S. at 374.

Significantly, this Court has recognized that a bankruptcy referee can hear and decide such plenary suits with the consent of the parties. *MacDonald* v.

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[28] Indeed, the referee was empowered in appropriate circumstances to conduct jury trials. See Bankruptcy Rules 115(b)(1) and 409(c).

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Nos. 81-150 and 81-546

In The Supreme Court of the United States

OCTOBER TERM, 1981

NORTHERN PIPELINE CONSTRUCTION CO.,

Appellant,

v.

MARATHON PIPE LINE COMPANY and
UNITED STATES OF AMERICA,

Appellees.

UNITED STATES OF AMERICA,

Appellant,

v.

MARATHON PIPE LINE COMPANY and
NORTHERN PIPELINE CONSTRUCTION CO.,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF FOR APPELLEE MARATHON PIPE LINE COMPANY

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QUESTION PRESENTED

Whether, under 28 U.S.C. §1471(c) of the Bankruptcy Reform Act of 1978, bankruptcy judges whose tenure and compensation do not meet the requirements of Article III of the Constitution may constitutionally exercise nationwide personal jurisdiction, conduct jury trials, and enter and enforce judgments within the states in disputes between private parties based upon common law and state or federal statutory claims?

Rule 28.1 list of appellee's parent companies, subsidiaries and affiliates: Marathon Oil Company (parent company).

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Plymouth County Trust Co., 286 U.S. 263 (1932); *Page* v. *Arkansas Natural Gas Corp.*, 286 U.S. 269 (1932); 2A *Collier on Bankruptcy* ¶ 38.09, at 1435 (14th ed. 1978). The change made in the 1978 Act to permit bankruptcy courts to exercise jurisdiction over plenary suits without consent does not lead to a different result under Article III. If, in fact, there had been an Article III bar to vesting jurisdiction of plenary suits in a bankruptcy referee or legislative adjunct court, that would have been a defect of subject matter jurisdiction (see *Glidden Co.* v. *Zdanok*, *supra*, 370 U.S. at 535-537 (opinion of Harlan, J.)) that could not have been cured by consent. See, *e.g.*, *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934); *Minnesota* v. *Hitchcock*, 185 U.S. 373, 382 (1902); *Mansfield, Coldwater & Lake Michigan Ry.* v. *Swan*, 111 U.S. 379, 382 (1884); C. Wright, *Law of Federal Courts* 17-18 (3d ed. 1976). Thus, the absence of consent under the new statute does not alter the implicit conclusion in *MacDonald* that there is no such Article III bar.

In sum, Congress' decision to constitute the new bankruptcy courts as adjuncts to the district court is a decision premised on the long-established system of adjunct referees and complies in all respects with the requirements of Article III.[29]

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[29] The only court decision of which we are aware that has considered this question, apart from the district court below, has rejected an Article III challenge to the Bankruptcy Act of 1978. See *In re Segarra*, 14 Bankr. Rep. 870 (D. P.R. 1981).

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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Whether the delegation of authority conferred in 28 U.S.C. §1471 to the bankruptcy judges is a constitutional delegation of jurisdiction.

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In The Supreme Court of the United States

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BRIEF FOR APPELLEE MARATHON PIPE LINE COMPANY

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth at Motion to Affirm, 2, 3, la-15a. The opinions below and jurisdiction of this Court are set forth in the Brief for the United States at 1, 2.

STATEMENT OF THE CASE

Proceedings Below

On March 8, 1979, Northern Pipeline Construction Company (hereinafter "Northern") instituted a lawsuit against Marathon Pipe Line Company (hereinafter "Marathon"), pursuant to 28 U.S.C. §1332, in the United States District Court for the Western District of Kentucky for claims arising out of a contract between the parties involving the construction of a pipeline in Kentucky. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, No. C-79-0110-L(B), (W.D. Ky.). On January 14, 1980, Northern filed a petition for reorganization in the United States Bankruptcy Court for the District of Minnesota. On March 25, 1980, Northern filed in the Bankruptcy Court a complaint against Marathon, in which it alleged the same contract claims against Marathon that Northern had asserted in the lawsuit pending in the Western District of Kentucky, with the exception of a claim for mechanic's lien relief. Northern sought to enforce claims for monies allegedly due under written contracts and for changes and additional work on the pipeline and to recover damages for alleged breaches of contract and warranty, misrepresentations and economic coercion and duress. (J.A. at 6). The claims are all governed by state law. Northern claimed jurisdiction in the bankruptcy court under 28 U.S.C. §1471. (J.A. at 6).

Marathon responded by moving for dismissal of Northern's complaint on the ground that the grant of jurisdiction to the non-Article III bankruptcy referee in 28 U.S.C. §1471(c) is unconstitutional. The bankruptcy judge denied Marathon's motion (Gov. J.S. App. (hereinafter "J.S. App") 27a-36a) and Marathon appealed to the district court pursuant to Bankruptcy Reform Act of 1978, Title IV, Section 405(c), 92 Stat. 2685 (hereinafter "Reform Act"). On appeal, the district court dismissed Northern's complaint against Marathon on the

ground that "the delegation of authority in 28 U.S.C. §1471 to the Bankruptcy Judges to try cases which are otherwise relegated under the Constitution to Article III Judges is an unconstitutional delegation of authority." (J.S. App. 1a-2a.) The United States and Northern timely filed notices of appeal to this Court. Probable jurisdiction was noted on November 9, 1981.

The Bankruptcy Reform Act

The legislative history of the Reform Act is briefly set out in the Government's brief. Brief at 2, 3. After the constitutionality of the exercise of jurisdiction over suits by a bankrupt's trustee against a non-consenting defendant by judges lacking Article III guarantees of life tenure and undiminished salary was questioned during hearings on proposed bankruptcy legislation, Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 2081-84 (1977) (hereinafter "House Hearings") (testimony of William T. Plumb), the House Subcommittee studied the constitutional question and on June 13, 1977 issued a report which concluded that "the text of the Constitution and the case law indicate that . . . Congress should establish the proposed bankruptcy court under Article III, with all of the protection that the Framers intended for an independent judiciary." Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, Report on Constitutional Bankruptcy Courts, 95th Cong., 2d Sess. 33 (Comm. Print No. 3, 1977) (hereinafter "Subcommittee Report"). On July 14, 1977, the Department of Justice sent a letter and memorandum to the Chairman of the House Committee on the Judiciary stating that, although the Department opposed the creation of independent Article III bankruptcy courts, it had concluded that "the proposed bankruptcy courts cannot be created as Art. I courts." Letter with Appendix of Patricia M. Wald, Assistant

Attorney General for Legislative Affairs, dated July 14, 1977, annexed hereto as Appendix A, at 3a (hereinafter "Justice Dep't. Letter"). Based on the Subcommittee Report and the Justice Department Letter, the Judiciary Committee reported out on July 19, 1977, a bill which provided both for independent bankruptcy courts exercising expanded jurisdiction and Article III status for bankruptcy judges. H.Rep. No. 95-595, 95th Cong., 1st Sess. 3 (1977) (hereinafter "House Report"). When H.R. 8200 came up for consideration by the House, an amendment was adopted eliminating the expanded jurisdiction and Article III status of bankruptcy courts. 123 Cong. Rec. H-11,782-83 (daily ed. Oct. 28, 1977). The bill was then withdrawn from the House floor and sent back to the Judiciary Committee. *Id.* at H-11,783. The Subcommittee on Civil and Constitutional Rights held hearings on the issue of the structure of the bankruptcy court and again concluded that the exercise of extended jurisdiction by bankruptcy courts required Article III judges. Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 95th Cong., 2nd Sess., Report on Hearings on the Court Administrative Structure for Bankruptcy Cases (Comm. Print No. 13, 1978). Upon reconsideration by the House, the amendment that eliminated the Article III safeguards was defeated and H.R. 8200 was passed on February 1, 1978. 124 Cong. Rec. H-478 (daily ed. Feb. 1, 1978).

Following hearings in November and December, 1977, before the Senate Subcommittee on Improvements in Judicial Machinery, the Senate passed its own bankruptcy bill, S.2266, which eliminated the life tenure and guaranteed salary protections of the House bill and instead adopted the concept of an independent bankruptcy court created as an "adjunct" to an Article III court. Both extended jurisdiction and the Senate "adjunct" concept were incorporated into the final bill as a result of a series of last minute meetings between

the managers of the bills in both Houses. *See*, K. Klee, *Legislative History of the New Bankruptcy Law*, 28 DePaul L.Rev. 941, 951 (1979); 124 Cong. Rec. H-11,089 (daily ed. September 28, 1978) (remarks of Rep. Don Edwards).

Prior to the enactment of the Reform Act, jurisdiction over bankruptcy matters was vested in and exercised by United States District Courts. Former 11 U.S.C.§§ 1(10), 11. The Reform Act creates a new federal court of record in each judicial district, each of the ninety-two courts denominated a "United States Bankrutpcy Court for the district" (hereinafter "bankruptcy court[s]"). 28 U.S.C. § 151(a); 28 U.S.C. § 451. The bankruptcy courts will come into existence on April 1, 1984. Reform Act, Title IV, § 402(b), 92 Stat. 2682. Judges of the bankruptcy courts are to be appointed by the President, with the advice and consent of the Senate, for a term of fourteen years, 28 U.S.C. §§ 152, 153, and their compensation is indexed to the Federal Salary Act, 2 U.S.C. §§ 351-361, and is subject to review including diminution. 28 U.S.C. § 154. The bankruptcy judges are not only dependent for reappointment upon the President and the Senate, 28 U.S.C. §§ 152, 153, but may be removed without impeachment "for incompetency, misconduct, neglect of duty, or physical or mental disability". 28 U.S.C. § 153(b).

The existing "courts of bankruptcy" are continued during the transition period from the effective date of the Reform Act, October 1, 1979, to April 1, 1984, but the bankruptcy referees appointed prior to the effective date of the Reform Act are fully empowered to act as bankruptcy judges and to exercise all powers and jurisdiction which Congress purportedly conferred on the bankruptcy courts under the Reform Act. Reform Act, Title IV, §§ 404, 405, 92 Stat. 2683, 2684. The referees, whom the Reform Act styles "bankruptcy judges," were appointed by the respective district courts for a term of

six years. Former 11 U.S.C. § 62. The referees' compensation, like that of the bankruptcy judges, is indexed to the Federal Salary Act which allows for diminution. Former 11 U.S.C. § 68; Reform Act, Title IV, § 404 (f), 92 Stat. 2684. In addition, the referees may be removed from office for less than impeachable offenses. Former 11 U.S.C. § 62(b); Title IV, § 404(b) and (d), 92 Stat. 2683-84.

The Reform Act purports to invest the non-Article III judges of the bankruptcy courts, including referees during the transition period, with "the powers of a court of equity, law and admiralty." 28 U.S.C. § 1481; Reform Act, Title IV, § 405(a) and (b). In addition to possessing all the powers of a court of law to enter and execute final judgments in disputes between private parties, bankruptcy courts may fashion new remedies where remedies at law are inadequate and are empowered to enjoin any individual, corporation, or state or federal governmental agency except another court, 28 U.S.C. § 1481. Further, the judges are empowered pursuant to 18 U.S.C. § 401 to punish all civil contempts and even criminal contempts except those "not committed in the presence of the judge of the court" or those "warranting a punishment of imprisonment." 28 U.S.C. § 1481. The bankruptcy judges are explicitly given the power to issue all writs necessary in aid of the bankruptcy courts' expanded jurisdiction, 28 U.S.C. § 1651; to hold jury trials, 28 U.S.C. § 1480; to issue declaratory judgments, 28 U.S.C. § 2201; to issue writs of habeas corpus, 28 U.S.C. § 2256; and to issue any order, process or judgment that is necessary or appropriate to carry out the provisions of Title 11. 11 U.S.C. § 105(a).

At the same time that the Reform Act grants the bankruptcy judges virtually all the powers of the federal district judges, the Act purportedly grants bankruptcy judges, including interim judges, jurisdiction not only over all cases under Title 11, but over "all civil proceedings...related to cases under title 11." 28 U.S.C.

§ 1471(b). Bankruptcy courts may thereby exercise jurisdiction over any lawsuit to which the trustee or debtor is a party, even though the defendant is not a participant in the bankruptcy proceedings and the claim arises under common law or state or federal statutory law. H.Rep.No. 95-595, 95th Cong., 1st Sess. 49 (1977).

In addition, all bankruptcy proceedings and related cases are completely withdrawn from the supervision and control of an Article III court. The Reform Act nominally vests original but not exclusive jurisdiction of "all civil proceedings . . . related to cases under title 11" in the district courts, 28 U.S.C. § 1471 (b), but then immediately removes "all of the jurisdiction" from the district courts and transfers it to the new bankruptcy courts. 28 U.S.C. § 1471(c). Bankruptcy judges may also exercise a non-reviewable right to remove from any state or federal court to bankruptcy court any civil action "arising in or related to a case under title 11" except a United States Tax Court proceeding or a civil action by a governmental unit to enforce the governmental unit's police or regulatory power. 28 U.S.C. § 1478.

The Reform Act does not guarantee direct appellate review by an Article III court, but rather provides that initial appeals from the decisions of the bankruptcy courts will be to panels of three non-Article III bankruptcy judges appointed by the chief judge of the respective circuit. 28 U.S.C. §§ 160, 1482. If no such appeals panel is designated, the district court shall exercise this appellate jurisdiction. 28 U.S.C. § 1334. The courts of appeals are given jurisdiction of appeals from the appellate panels and the district court. 28 U.S.C. § 1293(a). If the parties agree, a direct appeal to a court of appeals may be taken from a final judgment of a bankruptcy court. 28 U.S.C. § 1293(b). During the transition period parties may also appeal to the district court for the district in which the bankruptcy judge

presides. Reform Act, Title IV, § 405(c)(1)(C), 92 Sta 2685. Unlike prior practice under the Bankruptcy A which until 1973 provided for *de novo* review of refe ees' reports, the appellate courts now must accept th bankruptcy court's findings "unless they are clear erroneous." Bankruptcy Rules 752 and 810; Suggeste Interim Bankruptcy Rules 8001, 8002.[1]

SUMMARY OF ARGUMENT

I

The establishment of ninety-two new non-Article I federal trial courts and potentially eleven new non-Art cle III appellate courts by the Reform Act represen the most drastic restructuring of the federal judici system since the Judiciary Act of 1789. Under th Reform Act, these completely independent bankrupt courts exercise nationwide personal jurisdiction an subject matter jurisdiction over all civil cases previous heard in state and federal courts to which the trustee debtor is a party or which are otherwise related to th bankruptcy proceedings. By permitting the exercise such jurisdiction by non-Article III bankruptcy judge the Reform Act constitutes a radical departure from th Constitution's structure of divided powers. The A compromises the independence of the judicial branch the federal government and thereby establishes a prec dent that would allow further intrusions of uncheck federal power in the states.

Article III, Section 1 of the Constitution guarante life tenure, undiminished compensation, and remov by impeachment for the judges of all inferior feder courts. The bankruptcy judges have not been grant any of the protections mandated by Article III. Th absence of these protections directly contravenes th Framers' attempt to circumscribe the exercise of feder

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[1] Bankruptcy General Order No. 47 which allowed the district co judge to review and re-examine the record and take additional evide was superseded in 1973 by Bankruptcy Rules 752 and 810.

judicial power in the states and to ensure the independence of the judicial branch of the federal government by imposing tenure and salary requirements on all judges of inferior federal courts. Since the exercise of jurisdiction under the Reform Act over suits "related to" bankruptcy proceedings is a form of federal question jurisdiction, *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 610, 652 n.3 (1949), the denial to Marathon of an Article III judge is a deprivation of a basic constitutional right. *Glidden Co. v. Zdanok*, 370 U.S. 530, 533, 536-37 (1962).

II.

A. The bankruptcy courts' exercise of expanded jurisdiction cannot be sustained on the ground that it satisfies the requirements of Article III. Although the bankruptcy courts are styled "adjuncts" to the district courts, they in fact exercise all of the district courts' jurisdiction over cases "related to" bankruptcy proceedings. 28 U.S.C. § 1471(c). By vesting ultimate decision-making authority and sole and complete control over the entire litigation and judgment enforcement process in non-Article III bankruptcy judges, the Reform Act violates the limitations on constitutional delegation of Article III power set out last Term in *United States v. Raddatz*, 447 U.S. 667 (1980).

B. Appellants' argument that past practice under the Bankruptcy Act of 1898 represents a valid exception to the constitutional guidelines established by *Raddatz* relies upon a misapprehension of the radical changes in the power and jurisdiction of bankruptcy courts effected by the Reform Act. Prior to 1973, district courts' control over bankruptcy proceedings essentially comported with the requirements of constitutional delegation set out in *Raddatz*, including control of reference and *de novo* determination. Even under the 1973

Bankruptcy Rules, district courts controlled proceedings before referees by means of their power to withdraw cases at any time and thus, although no court so held, the delegation to referees arguably met the *Raddatz* requirements. Appellants' second argument that the former Bankruptcy Act vested jurisdiction over plenary suits in bankruptcy referees upon a defendant's consent is also mistaken. Jurisdiction over plenary suits was always vested in an Article III district court. *McDonald v. Plymouth County Trust Co.*, 286 U.S. 263 (1932); *Williams v. Austrian*, 331 U.S. 642 (1947); *Schumacher v. Beeler*, 293 U.S. 367 (1934). Furthermore, at no time under the former Bankruptcy Act could a referee conduct a jury trial in a matter like the present case, where the defendant has a constitutional right to a trial of a common law claim.

C. Appellants' argument that the existence of ultimate review by an Article III judge satisfies Article III is directly contradicted by the explicit requirement of Article III that "Judges, *both* of the supreme and inferior courts" shall enjoy life tenure and undiminished compensation. As recognized by James Madison, appellate review of errors of law does not alleviate the dangers of having a "dependent judge." 1 *Records of the Federal Convention* 124 (M.Farrand ed. 1911). Appellants' argument that Article III applies only to appellate courts proves too much in that it would lead to the absurd result that Congress could create non-Article III trial courts in place of the present federal district courts.

III.

A. The legislative history of the Reform Act reveals that after the Department of Justice and the House took the position that Article I bankruptcy courts would be unconstitutional, the Senate rejected a suggestion to establish "a separate Article I court" and instead

adopted the "adjunct" approach discussed above. Congress could not have created Article I bankruptcy courts consistent with the Constitution since legislative courts can validly be and have only been created where they do not transgress Article III's underlying principles of federalism and separation of powers.

B. Legislative courts with general jurisdiction may operate without violating the federalist and tripartite structure of the national government only in those geographical areas outside of the states in which the federal government exercises the sovereign power of a state. *American Insurance Co. v. 356 Bales of Cotton (Canter)*, 26 U.S. (1 Pet.) 511 (1828). Both the territories and the District of Columbia are specialized areas where Congress is not bound by federalist constraints in creating local courts to hear local matters. *Palmore v. United States*, 411 U.S. 389 (1973). However, this Court has recognized that even in the District of Columbia only Article III courts may exercise jurisdiction "where laws of national applicability and matters of national concern are at stake." *Id.* at 408; *O'Donoghue v. United States*, 289 U.S. 516 (1933).

C. Although most specialized federal courts within the states are Article III courts, there are two subject matter legislative courts within the states, the Court of Military Appeals and the Tax Court. These courts do not violate the principle of separation of powers because they exercise limited judicial powers and exercise jurisdiction solely over those matters arising between the government and others which involve the federal sovereign power to conduct war and collect taxes, *Burns, Stix Friedman & Co. v. Commissioner*, 57 T.C. 392, 396 (1971), *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858). Far from supporting the bankruptcy court's exercise of nationwide personal jurisdiction and almost limitless subject matter jurisdiction over common law and state and federal statutory disputes, decisions of this Court repeatedly have held unconstitutional any exercise of

expanded jurisdiction by subject matter legislative courts that encroaches upon the jurisdiction of Article III courts. *O'Callahan v. Parker*, 395 U.S. 258 (1969), *United States ex.rel. Toth v. Quarles*, 350 U.S. 11 (1955). Congress cannot, in enacting uniform legislation, withdraw from the Article III courts and delegate to the legislative or executive departments suits at common law, or in equity or admiralty. *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

In addition, no extraordinary need exists to justify the transfer of non-bankruptcy lawsuits to a legislative bankruptcy court, even if such a transfer were possible. No practical advantage is gained by trying antitrust or state property lawsuits before specialized bankruptcy judges. Not only does the creation of specialist trial and appellate courts run counter to the modern trend in judicial administration, but violation of the principles of federalism and comity caused by removal of non-bankruptcy common law cases from the state courts to federal legislative tribunals cannot be justified on the ground of efficiency.

D. Congress did not create the bankruptcy courts as an administrative agency. Furthermore, even if Congress had chosen such an alternative, no administrative agency has ever been empowered to exercise the full judicial powers or broad subject matter jurisdiction over state law claims granted to the bankruptcy courts. "Wholly private tort [and] contract . . . cases," like the present case, may not be delegated to administative agencies. *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442, 458 (1977).

ARGUMENT

I. ARTICLE III OF THE CONSTITUTION REQUIRES THAT A LAWSUIT BROUGHT BY A BANKRUPTCY TRUSTEE AGAINST A NON-PARTICIPANT IN THE BANKRUPTCY PROCEEDING IN AN INFERIOR FEDERAL COURT BE HEARD BEFORE A JUDGE WITH LIFE TENURE AND UNDIMINISHABLE SALARY.

The Reform Act represents the first attempt by Congress in the history of the nation to establish in each state an independent federal court with judges who do not enjoy the Article III guarantees of life tenure and undiminished salary and who are vested with the power to conduct jury trials and enter and enforce final judgments in disputes between private parties based upon common law as well as statutory and constitutional claims. The district court below correctly concluded that the vesting of such broad jurisdiction in a non-Article III judge contravenes Article III, section 1 of the United States Constitution which provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their continuance in Office.

Appointment "during good Behavior" has been read uniformly to require life tenure for judges of the inferior federal courts. *See, e.g., United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955); *Shurtleff v. U.S.*, 189 U.S. 311, 316 (1903); P. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U.Chi. L.Rev. 665, 669 (1969). Article III requires that the compensation of federal judges be not

just statutorily guaranteed, but that it be beyond the purview of Congress to diminish. *Glidden v. Zdanok*, 370 U.S. 530, 534 (1962) (Harlan, J., concurring). As judicial officers of the United States, judges of the inferior courts appointed "during good Behavior" may be removed from office solely upon impeachment for a conviction of treason, bribery or other high crimes and misdemeanors. U.S. Const. art. II, §4; *see, e.g., Toth*, 350 U.S. at 16; *Shurtleff*, 189 U.S. at 316; Kaufman, *Chilling Judicial Independence*, 88 Yale L.J. 681 (1979). Bankruptcy judges, both during the transition period and after April 1, 1984, are denied all of the protections mandated by Article III. They serve periodic terms and are dependent for reappointment upon the President and the Senate. Their compensation may be reviewed and diminished by Congress, and they may be removed from office for less than impeachable offenses.

Although Article III does not require Congress to create any inferior federal court at all, *see Glidden Co. v. Zdanok*, 370 U.S. 530, 551 (1962) (opinion of Harlan, J.), or to vest all of the jurisdiction to which the judicial power of the United States extends in those inferior courts it does create, *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8 (1799); *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850), Article III does require that when Congress creates an inferior court to exercise "the judicial power of the United States," all judges of such a court be appointed to serve "during good Behavior" with an undiminishable salary. Although appellants argue that these mandatory requirements of Article III may be disregarded whenever Congress finds a particular "need" to disregard Article III, neither the language of the Constitution nor cases interpreting Article III support such an argument. Just last Term in *United States v. Will*, 449 U.S. 200 (1980), this Court, in holding that Congress is forbidden by the Compensation Clause to repeal judicial salary increases after they have taken

effect, re-emphasized the fundamental and inviolable nature of Article III's guarantees which form the cornerstone of the independence of the judicial branch of the federal government:

> The Compensation Clause has its roots in the long-standing Anglo-American tradition of an independent judiciary. A judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.

Id. at 217-218. *See also, Evans v. Gore*, 253 U.S. 245, 248-53 (1920).

No evidence exists that the Constitution's authors intended Article III to allow Congress to create in the states some inferior federal courts which do not comport with the tenure and salary provisions of that Article. *See, e.g.*, Note, *The Distinction Between Legislative and Constitutional Courts and Its Effect on Judicial Assignment*, 62 Col.L.Rev. 133, 149 (1962). As Justice Frankfurter has noted, "there was a deep distrust of a federal judicial system, as against the State judiciaries, in the Constitutional Convention." *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 647 (1949). In drafting the Constitution, the Framers sought to protect against an overbearing national government, not by employing the technique adopted in the Bill of Rights of preventing governmental intrusions into defined areas of individual conduct, but by first limiting the federal government's power and then dividing the remaining power among three autonomous branches. The Framers thus intended the limitations of Article III to serve the concepts of both federalism and separation of powers:

> [There are] two entirely different principles embodied in Article 3 as elsewhere in the Constitution, but of which were repeatedly adverted to in

> the Constitutional Convention and have since been followed by this Court without substantial deviation.
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> The first of these principles is that the three branches of government established by the Constitution are of coordinate rank and that none may encroach upon the powers and functions entrusted to the others by that instrument ... Of equal importance, however, was the second principle, that the "Constitution contains a grant of power by the states to the federal government, and that all powers not specifically granted were reserved to the states or to the people."

Tidewater, supra, at 628 (Rutledge, J., concurring). *See* T. Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 Geo. L. J. 297, 301-303 (1981) (hereinafter "Krattenmaker").

In creating a federal government of limited powers, the states were particularly reluctant to permit state courts to be displaced by inferior federal tribunals. At the Convention, there were many "who thought that no inferior federal tribunals should be authorized; that state courts should be entrusted with the decision of all federal questions, subject to appeal to one Supreme Court." *Tidewater, supra*, at 632. Indeed, John Rutledge's motion to strike out "inferior tribunals" from the Judiciary Article carried five states to four with two divided. After the motion carried, Madison suggested a compromise by which the Legislature would be given the discretion to establish inferior tribunals. 1 *The Records of the Federal Convention* 124-125 (M. Farrand ed. 1911) (hereinafter "Farrand"). Even though this proposal encountered strong opposition,[2]

[2] Pierce Butler stated that "[t]he people will not bear such innovations. The states will revolt at such encroachments." 1 Farrand, supra ,

Madison's compromise was adopted. *Id.* As a result of this compromise, Congress was given power to create inferior federal tribunals which would exercise judicial power in the states subject to two limitations: the tenure and salary requirements of Article III, §1, and the subject matter limitations of Article III, §2.

Article III was intended not only to circumscribe the exercise of federal judicial power in the states, but also to prevent "[t]he accumulation of all powers, legislative, executive and judiciary, in the same hands..." *The Federalist*, No. 47 (J. Madison) 324 (J. Cooke ed. 1961). As noted by this Court in *O'Donoghue v. United States*, 289 U.S. 516, 531 (1933),

> [t]he anxiety of the framers of the Constitution to preserve the independence especially of the judicial department...was foreshadowed, and its vital character attested, by the Declaration of Independence, which, among the injuries and usurpations recited against the King of the Great Britain, declared that he had "made judges dependent on his will alone, for the tenure of their offices, and the amount in payment of their salaries."

Alexander Hamilton in *The Federalist*, Nos. 78 and 79, emphasized the importance of the tenure and salary guarantees in achieving the Framers' objective of preserving the independence of the judicial branch:

> The standard of good behavior for the continuance in office of the Judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy, it is an excellent barrier to the despotism of the prince: In a republic, it is a no less excellent barrier to the

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125. See also 2 Farrand, *supra*, 45-46; 3 Farrand, *supra*, 156-57 (argument of Luther Martin before Maryland House of Representatives opposing ratification of the Constitution).

> encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws. . . . Periodical appointments, however regulated, or by whomsoever made, would in some way or other be fatal to their necessary independence. [No. 78, *supra*, at 522, 529].
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> Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . In the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realised in practice the complete separation of the judicial from the legislative power, in any system, which leaves the former dependent for pecuniary resources on the occasional grants of the latter. [No. 79, *supra*, at 531]

The tenure and salary provisions were intended to serve important structural values in the Constitution. "They disperse power, preserve the appearance of fairness, protect the independence and integrity of federal judges, and eliminate the need for case-by-case supervision of a judge's independence under the rubric of due process." *Krattenmaker*, *supra*, at 306. These provisions are the answer the United States has adopted by means of a written constitution, on the basis of the Framers' historical experience, to the question of how far judges and legislators should be separated. *Id.* at 311. The Reform Act's disregard of Article III's requirements seriously impairs the vitality of the Constitution's division of powers, regardless of whether fairness to individual litigants is maintained.

The tenure and salary guarantees of Section 1 of Article III apply to all inferior courts that exercise "the judicial power of the United States." Article III, Section

2 provides that "the judicial Power shall extend to all Cases in Law and Equity, arising under. . . the Laws of the United States. . . " Because the present suit is a case arising under federal law, the bankruptcy court below was called upon to exercise the "judicial power of the United States." The jurisdiction to adjudicate claims by trustees against non-participants in the bankruptcy proceedings has been exercised by the federal district and circuit courts for over a century. Bankruptcy Act of 1841, Act of August 16, 1841, c.9, §§6, 8, 5 Stat. 440, 446; Bankruptcy Act of 1867, Act of March 2, 1867, c.176, §§1, 2, 14 Stat. 517, 518; Bankruptcy Act of 1898, Act of July 1, 1898 (hereinafter "1898 Act") c.541, §§2, 23, 30 Stat. 544, 545, 552 (former 11 U.S.C. §46(b)). The exercise of jurisdiction by Article III federal courts over such suits is a form of federal question jurisdiction. *See Mitchell v. Great Works Milling and Manufacturing Co.*, 17 F.Cas. 446, 449 (C.C.D.Me. 1843) (Story, J.); *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 611-612, 652 n.3, (1949) (Rutledge and Murphy, J.J., concurring; Frankfurter, Reed, Vinson and Douglas, J.J., dissenting); Mishkin, *The Federal "Question" in the District Courts*, 53 Col. L. Rev. 157, 194-95, (1953). Indeed, Justice Rutledge, concurring in *Tidewater, supra*, expressly held that the exercise of jurisdiction over plenary suits by trustees upon the consent of the defendant constituted "a segment of the district court's federal-question jurisdiction." *Id.* at 612.

Article III therefore requires that, if Northern's claim is to be adjudicated by a federal court, the judge of the inferior court must enjoy Article III's tenure and compensation guarantees. The Reform Act's denial to Marathon of a proceeding before an Article III judge is a deprivation of "basic constitutional protections designed in part for the benefit of litigants." *Glidden, supra*, at 536. *See, O'Donoghue v. United States, supra*, at 533.

Appellants have argued that the constitutionality of the exercise of expanded jurisdiction by the non-Article III court may be sustained either on the ground that the bankruptcy courts do in fact meet Article III's tenure and compensation requirements, or that the bankruptcy courts are removed from the requirements of Article III because they constitute legislative or Article I courts. The logical application of appellants' arguments leads to the conclusion that Article III places no express limitations whatsoever on Congressional power to establish federal courts in the states. Short of adoption of the appellants' underlying premise that Article III be deleted from the Constitution and relegated to the historical waste basket, the Reform Act's provisions for exercise of expanded jurisdiction by non-Article III judges cannot be upheld. As discussed below, non-Article III bankruptcy courts in exercising jurisdiction over non-bankruptcy common law suits between private parties cannot be sustained either as satisfying the requirements of Article III or as constituting legislative courts when such assertions are analyzed in light of the "definiteness and precision of phrasing" of Article III, *Tidewater, supra*, at 654 (Frankfurter, J., dissenting), and Article III's informing principles of federalism and separation of powers. *See United States v. One 1974 Rockwell Aerocommander*, No. CA4-80-289E (N.D.Tex. Jan. 11, 1982); Krattenmaker, *supra;* Plumb, *The Tax Recommendations of the Commission on the Bankruptcy Laws: Tax Procedures*, 88 Harv.L.Rev. 1360, 1458-69 (1975) (hereinafter "Plumb"); Note, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 Col.L.Rev. 560 (1980) (hereinafter "Columbia Note").

II. MARATHON'S CONSTITUTIONAL RIGHT TO AN ARTICLE III JUDGE IS NOT SATISFIED BY STYLING THE FULLY INDEPENDENT BANKRUPTCY COURT AN "ADJUNCT", NOR BY PROVISION OF ULTIMATE APPELLATE REVIEW BY AN ARTICLE III JUDGE

Appellants' argument that the bankruptcy courts may be sustained as meeting the requirements of Article III is essentially threefold: (1) that the cases over which the bankruptcy courts exercise jurisdiction are under the "total control" of the district court as required by *United States v. Raddatz*, 447 U.S. 667 (1980), because the courts are styled "adjuncts" to the district courts; (2) that the Reform Act is not a significant change from the jurisdiction or powers exercised by referees under the Bankruptcy Act and thus, that even if the requirements of *Raddatz* are not met, they have not been met for eighty years; and (3) Article III is satisfied if at some point a litigant is afforded limited appellate review by an Article III judge.

A. Article III is not satisfied by the "adjunct" label, absent any control or decisional authority in the district courts.

Appellants' argument that the styling of the bankruptcy courts as "adjunct[s]" to the district courts satisfies Article III does not withstand an analysis of the actual powers and jurisdiction conferred upon the newly created independent courts of record. The designation as "adjunct" is not implemented by any other provisions in the Reform Act. 28 U.S.C. §1471(b) initially deposits jurisdiction over civil proceedings related to cases under Title 11 in the district courts, but then "all of the jurisdiction conferred by this section on the district courts" is immediately removed from the district courts and redeposited in the bankruptcy courts. 28 U.S.C. §1471(c). While the Senate Report urges that through this procedure the district courts act

as "article III repositories", S.Rep. No. 95-939, 95th Cong., 2d Sess. 16 (1978) (hereinafter "Senate Report), the language of 28 U.S.C. §1471 can at best be read to provide for a metaphysical rather than temporal vesting of the jurisdiction in the district courts. "It is quite doubtful that this bit of legerdemain will overcome any extant constitutional prohibitions." 1 *Collier on Bankruptcy* §2.01, p. 2-29 (15th ed. 1980); *Marathon*, J.S.App. at 5a n.4. Indeed, the legislative history of this provision indicates that Congress actually sought to create a "functionally independent bankruptcy court." Senate Report, *supra*, at 15, 17; House Report, *supra*, at 2.

Whatever the import of the term "adjunct", it is clear that the delegation of ultimate decisional control to a non-Article III judge transgresses the limits on delegation of powers by Article III courts clearly delineated by this Court last Term in *United States v. Raddatz*, 447 U.S. 667 (1980). The majority in *Raddatz* held that a limited delegation for the purpose of allowing a magistrate to hear a pretrial suppression motion did not violate Article III because the entire process was under the "total control" of and the ultimate decision was made by the district court judge.[3] *Id.* at 682. In contrast to the present case, the Court in *Raddatz*

> [did] not face a procedure under which 'Congress [has] delegate[d] to a non-Art III judge the authority to make final determinations on issues of fact.'

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[3] The reference of the pretrial motion to a magistrate was in the sole discretion of the district court judge. *Raddatz*, 447 U.S. at 673. The defendant retained the right to trial before an Article III judge, together with the right to renew his suppression motion at trial. *Id.* at 678 n.6. Upon submission of "proposed findings of fact and recommendations", 28 U.S.C. §636(b), the district court judge was required to conduct a "de novo determination" in which the judge could "freely reject the magistrate's recommendation ... hear the evidence in whole or part... call for additional findings or otherwise recommit the matter to the magistrate with instructions." *Raddatz, supra*, at 685 (Blackmun, J., concurring).

> Post, at 703, 65 L.Ed.2d, at 451 (dissenting opinion). Rather, we confront a procedure under which Congress has vested in Art III judges the discretionary power to delegate certain functions to competent and impartial assistants, *while ensuring that the judges retain complete supervisory control over the assistant's activities.*

Id. at 686 (Blackmun, J., concurring) (emphasis added).

The Reform Act's creation of an independent court empowered to conduct jury trials and enter and enforce final judgments cannot be sustained as a permissible delegation to an assistant within the district court. A "delegation does not violate Art III *so long as* the ultimate decision is made by the district court." *Id.* at 683 (emphasis added). *See Mathews v. Weber*, 423 U.S. 261, 269-71 (1976); *Wingo v. Wedding*, 418 U.S. 461, 478 n.4, 484-86 (1974) (Burger, C. J., dissenting). Under the Reform Act, however, not only is the ultimate decision made by the bankruptcy judge, but the entire process of filing, service, discovery, trial and entry and enforcement of judgement is under the bankruptcy courts' sole and complete control. As such, the exercise of expanded jurisdiction by the bankruptcy courts does not even involve the question of permissible delegation of duties by the district courts because the district courts, as a practical matter, do not possess any jurisdiction and do not exercise any control over these plenary cases. The "delegation" is not made by the federal district courts, but by Congress. United States bankruptcy judges are not "assistants" to district court judges, but rather are judges of "functionally independent courts."[4]

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[4] Unlike masters, magistrates and other assistants, bankruptcy judges are "judges of the United States," 28 U.S.C. §451, and may be members of the Judicial Conference of the United States and the judicial conferences of the circuits, 28 U.S.C. §§331, 333. *See also* 28 U.S.C. §§293, 294, 295, 456, 771, and 772. Similarly, each bankruptcy court is declared a "court of the United States," 28 U.S.C. §451, and a "court of record," 28 U.S.C. §151.

B. The Reform Act made constitutionally significant changes from practice under the former Bankruptcy Act.

Appellants also argue that even if the absence of any district court control over the bankruptcy judge is unconstitutional under the guidelines established by *Raddatz*, these constitutional limitations do not apply in the bankruptcy context because the powers and jurisdiction purportedly conferred on the bankruptcy judges by the Reform Act are nearly identical to the powers and jurisdiction of the referees under the Bankruptcy Act of 1898. The proposition, dubious even if it had been factually accurate, fails because it relies on a misapprehension of the radical change in the structure and powers of the bankruptcy courts effected by the Reform Act. The Reform Act did much more than slightly alter the role of the bankruptcy referee, as suggested by appellants. Rather, it abolished the office of bankruptcy referee, established new courts of record completely independent of the control of the district courts, and vested the new courts with powers and jurisdiction nearly co-extensive with those of the district courts. *See* 1 *Collier on Bankruptcy* §§1.02(2), 1.03(1) (15th ed. 1980).

Although the role of the referee in bankruptcy has undergone a gradual development and expansion of powers since its creation in 1898, *see* House Report, *supra*, at 8-9, it was not until the Reform Act that all form of control over bankruptcy and bankruptcy-related proceedings was removed from the district court. Prior to the promulgation of the Bankruptcy Rules in 1973, bankruptcy referees acted as assistants to the district court, much as did the magistrates discussed in *Raddatz*. The Bankruptcy Act of 1898 did not provide for reference of cases to referees without an order of the district court judge. 1898 Act, *supra*, §22, 30 Stat. 552. Under the General Orders in Bankruptcy adopted by the Supreme Court in 1939, 305 U.S. 679

(1939), "reference of the case, if any reference is made, to a referee", G.O. No. 1, remained within the power of the district court judge, who also could "fix by special order" the times and places where the referee shall act. G.O. No. 12(2). In 1959, the Bankruptcy Act was amended to allow reference by the clerk "unless the judge or judges direct otherwise." Act of June 23, 1959, §3, 73 Stat. 109. In addition to exercising complete control over the reference of a case to a referee, the district court could, as it could with respect to the magistrate in *Raddatz*, revise or modify the referee's report and take additional evidence. G.O. No. 47.

While the method by which the district court exercised ultimate control over bankruptcy proceedings was modified when the Bankruptcy Rules were adopted in 1973, control was not abrogated. Rather, the mechanism for the district court's control shifted from the order of reference and power to rehear evidence and revise the referee's report to the power to "withdraw a case in whole or part from a referee" at any time. Bankruptcy Rule 102(b). Thus, even under the 1973 Rules, district courts continued to exercise a form of constant control over proceedings before bankruptcy referees.[5] Referees remained assistants to the district court judges subject to their control and review:

> [T]he referee is not in any sense a separate court, nor endowed with any independent judicial authority, and is merely an officer of the court of bankruptcy, having no power except as conferred by the order of the reference—reading this, of course, in the light of the act; and that his judicial functions, however important, are subject always to the review of the bankruptcy court.

[5] No court has held that the delegation of decision-making to referees during the six year interim between the promulgation of the Bankruptcy Rules and enactment of the Reform Act sufficiently comported with the requirements of constitutional delegation articulated in *Raddatz*, *supra*.

Weidhorn v. Levy, 253 U.S. 268, 271 (1920); *Matthews v. United Methodist Church (In re Pacific Homes)*, 611 F.2d 1253, 1255 (9th Cir. 1980), quoting *Weidhorn, supra. See also, Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144, 152-53 (1943).

The Reform Act not only strips the district courts of any control over proceedings before referees, but also grants the new bankruptcy courts jurisdiction over plenary lawsuits between trustees and non-participants in the bankruptcy proceedings, a jurisdiction never before exercised by the courts of bankruptcy, either by the district court sitting as a court of bankruptcy or by a referee, except by consent of the defendant. Prior to the Reform Act, a non-participant sued by the trustee had an absolute right to have the case tried before an Article III judge, if the matter was to proceed in a federal forum. Former 11 U.S.C. §46(b). Where the defendant had a constitutional right to a jury trial (as in the present case), only the district court judge could conduct that trial. Even under the 1973 Bankruptcy Rules, referees could not have conducted a jury trial in the present case,[6] and could only have determined the matter in a summary proceeding if Marathon had consented to the jurisdiction of the court of bankruptcy. *See, Phelps v. United States*, 421 U.S. 330 (1975); *Cline v. Kaplan*, 323 U.S. 97 (1944); *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426, 433-34 (1924); *Weidhorn, supra*; *Matthews v. United Methodist Church, supra*; *Hollywood National Bank v. Bumb*, 409 F.2d 23, 24 (9th Cir. 1969).

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[6] The 1973 Bankruptcy Rules strictly limited referees' conduct of jury trials to statutorily created causes of action — involuntary bankruptcy petitions and petitions to discharge debts — where defendants waived their statutorily created right to a jury trial before the district court. *See* Bankruptcy Rules 115(b)(1) and 409(c).

Appellants argue that Article III is no bar "to vesting jurisdiction of plenary suits in a bankruptcy referee or a legislative adjunct court", Gov. Brief at 45, because an involuntary defendant could consent to a summary proceeding before a referee. Appellants' argument on this point is confused and is based upon a misreading of *Schumacher v. Beeler*, 293 U.S. 367 (1934), *Williams v. Austrian*, 331 U.S. 642 (1947), and *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263 (1932). These cases do not even mention Article III because in all three cases jurisdiction over the plenary suits was vested in Article III district courts. In *Schumacher*, *supra*, and *Austrian*, *supra*, jurisdiction was vested in the district court and the matters proceeded before an Article III judge. Similarly, in *MacDonald*, "jurisdiction over the ... suit was ... vested in the District Court as a court of bankruptcy." 286 U.S. at 266. The issue in *MacDonald* was not whether subject matter jurisdiction was vested in a bankruptcy referee by consent, but whether, after jurisdiction was vested in a district court as a court of bankruptcy, the matter could properly be delegated to the referee appointed by the district court as a matter of procedure. *Id.* at 266-68.[7] Such a delegation from the district court to the referee did not violate Article III because, as discussed above,

[7] It should be noted that *MacDonald*, while technically a "plenary" proceeding, involved a voidable preference and thus involved property belonging to the debtor's estate. The distinction between voidable preferences under Section 60 of the former Bankruptcy Act and lawsuits to collect disputed damages by trustees against nonparticipants to the bankruptcy proceedings was codified by Section 23(b) of the former Bankruptcy Act. Former 11 U.S.C. §46(b). The case is thus dissimilar from the instant plenary proceeding brought to augment the estate rather than simply to collect existing assets. *See* Note, *Bankruptcy and the Limits of Federal Jurisdiction*, 95 Harv.L.Rev. 703 (1982). An action to recover disputed contract or tort damages is not an action to recover anything, because no "res," "fund" or "property" of the bankrupt exists. *See Hollywood National Bank*, *supra*, 409 F.2d at 24; *Tamasha Town and Country Club v. McAlester Construction Finance Co.*, 252 F.Supp. 80, 86 (S.D. Cal. 1966).

at the time of the decision in *MacDonald* in 1932, all matters referred to a referee remained under the total control of the Article III district court judge. Once subject matter is vested in the federal district court, the parties may, with approval of the court, consent to variations in the method of processing their litigation, including referral of the case for hearing to a non-Article III assistant. *See Hecker v. Fowler*, 69 U.S. (2 Wall.) 123 (1865); *Kimberly v. Arms*, 129 U.S. 512, 523-25 (1889); *DeCosta v. Columbia Broadcasting System*, 520 F.2d 499, 502-09 (lst Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976).

Since federal jurisdiction over a trustee's suit to enforce a contract claim was always vested in an Article III court exercising total control over the matter, prior practice under the Bankruptcy Act does not support the existence of an exception to the constitutional limits on delegation of judicial powers established by *Raddatz*, *supra*.

C. Article III applies equally to inferior federal trial and appellate courts.

Finally, appellants contend that the tenure and salary provisions of Article III apply only to appellate judges. This proposition is directly contradicted by the explicit requirement of Article III that "Judges, *both* of the supreme *and inferior Courts*, *shall* hold their Offices during good Behavior, and *shall*" receive an undiminished compensation. *See*, Krattenmaker, *supra*, at 307; Subcommittee Report, *supra*, at 65 (letter from Professor Sandalow). In encompassing all inferior federal court judges within the tenure and salary requirements of Article III, the Framers were fully aware that appellate review reaches only errors of law and only those few cases that actually go to trial and are

appealed.[8] "[B]ecause the threats to the separation of powers and judicial integrity envisioned by the Framers of Article III flow largely from control of judges' subsistence and tenure, rather than from direct manipulation of the law, appellate review is an inadequate corrective." *Columbia Note*, *supra*, at 592. *See also*, *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970) ("There can be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or *in any phase* of the *decisional function*." *Id.* at 84 (emphasis added)).

None of the cases cited by the Government support its suggestion that "at least in civil cases, Article III is satisfied if appellate review by an Article III tribunal is available." Gov. Brief at 41.[9] As discussed above, *Raddatz* held that delegation from a district court judge to a magistrate satisfied Article III requirements only where "the entire process takes place under the district court's

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[8] As discussed on pages 15-17 *supra*, the Federal Convention ultimately rejected Rutledge's proposal that there be no inferior tribunals and that all cases should be decided in the first instance by state tribunals with "the right of appeal to the supreme national tribunal." Madison, whose compromise solution was finally adopted, expressly stated that the extension of Article III guarantees solely to an appellate court was insufficient:

> "Mr. [Madison] observed that unless inferior tribunals were dispersed throughout the Republic with final jurisdiction in many cases, appeals would be multiplied to a most oppressive degree; that besides, *an appeal would not in many cases be a remedy*. What was to be done after improper Verdicts in State tribunals obtained under the biassed direction *of a dependent Judge . . .* ? *To remand the cause for a new trial would answer no purpose*. To order a new trial at the supreme bar would oblige the parties to bring up their witnesses, tho' ever so distant from the seat of the Court." 1 Farrand, *supra*, at 124 (emphasis added).

[9] Under the Reform Act, appeals will be taken from a non-Article III bankruptcy judge to a non-Article III three-judge panel where established. 28 U.S.C. §160. A second appeal from the panel to the circuit court of appeals would have to be taken to obtain Article III review. 28 U.S.C. §1293(a).

total control and jurisdiction," including control of reference and *de novo* review. *Raddatz*, 447 U.S. at 681. Given the almost co-extensive powers of the bankruptcy courts and district courts, the government's reading of Article III would require the absurd conclusion that Congress could create non-Article III United States district courts if their jurisdiction were limited "at least to civil cases," since the district courts would act simply as "primary fact finders ... leav[ing] the determination of the law in the hands of Article III judges," of the courts of appeal. Gov. Brief at 40.

The government's interpretation of Article III was impliedly rejected by this Court in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), which involved two cases. In one, a judge of the Court of Claims sat on a court of appeals panel. In the other, a federal district court trial was presided over by a judge of the Court of Customs and Patent Appeals and his decision was reviewed by a Court of Appeals composed solely of regular Court of Appeals judges. Justice Harlan's conclusion that the question of whether the Court of Customs and Patent Appeals was an Article I or Article III court could not be avoided, 370 U.S. at 534, clearly indicates that this Court did not consider that Article III was satisfied by the availability of appellate review by an Article III judge.

Thus, the mere labeling of the functionally independent bankruptcy courts as "adjuncts" does not satisfy the minimum requirements for constitutionally permissible delegation established by this Court in *Raddatz*. Nor does the existence of second or third tier appellate review by an Article III judge satisfy Article III's requirement that every judge of inferior federal courts enjoy life tenure and undiminished compensation. Congress' attempt to sidestep the constitutional infirmity in the Reform Act's grant of full judicial power and expanded jurisdiction to non-Article III judges by

means of semantic wordplay constitutes a dangerous inroad on the institutional protection that Article III courts were intended to provide.

III. IN EXERCISING FULL JUDICIAL POWERS AND NATIONWIDE JURISDICTION OVER LAWSUITS BETWEEN PRIVATE PARTIES WITHIN EACH STATE, A BANKRUPTCY COURT DOES NOT ACT AS A MERE LEGISLATIVE COURT OR ADMINISTRATIVE AGENCY.

A. Congress itself rejected the concept of Article I bankruptcy courts as unconstitutional.

Appellants finally argue that even if styling the independent bankruptcy courts "adjuncts" to the district courts does not satisfy the requirements of Article III, the new bankruptcy courts may be sustained on the ground that they are legislative courts or an administrative agency. Appellants' argument is ill-founded. The Reform Act and its legislative history indicate that Congress chose not to create bankruptcy courts as Article I courts based on the Department of Justice's and the House Committee on the Judiciary's conclusion that Article I bankruptcy courts would be unconstitutional. Justice Dep't Letter, *supra*; Hearings on S.2266 and H.R.8200 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 544, 548-49 (1977) (testimony of Attorney-General Griffin Bell); House Report, *supra*, at 7-52. Contrary to its procedure in creating the United States Court of Military Appeals, 10 U.S.C. §867, the United States Tax Court, 26 U.S.C. §7441, and the two local District of Columbia courts, 11 D.C. Code §11-101(2), Congress did not specify that the bankruptcy courts were "established under article I of the Constitution". This omission and the inclusion of the bankruptcy courts within Title 28 of the United States Code reflects Congress' decision to reject the suggestion of establishing "a separate article I court patterned

after the United States Tax Court", and, instead, to establish the new bankruptcy courts as "adjunct[s] of the United States District Court." Senate Report, *supra*, at 16.[10]

Congress' conclusion that the bankruptcy courts could not constitutionally be created outside of Article III is supported by a review of the limited "legislative court" doctrine. As pointed out by Justice Harlan in *Glidden v. Zdanok*, 370 U.S. 530, 543, (1962),

> [t]he Constitution nowhere makes reference to "legislative courts." The power given Congress in Art 1, §8, cl 9, "to constitute Tribunals inferior to the supreme Court" plainly relates to the "inferior Courts" provided for in Art 3, §1; it has never been relied on for establishment of any other tribunals.

This Court has upheld the establishment of federal tribunals outside the norm of Article III only in two extremely limited situations. First, outside of the states in geographical enclaves where the federal government exercises the full sovereign powers of a state government, non-Article III federal courts have been established which exercise full judicial powers and broad jurisdiction similar to bankruptcy courts. *Palmore v. United States*, 411 U.S. 389 (1973); *American Insurance Co. v. 356 Bales of Cotton* (Canter), 26 U.S. (1 Pet.) 511 (1828). Second, inside the states, legislative courts have been established which exercise limited judicial powers and jurisdication confined solely to those disputes between the government and others which are capable of purely executive or legislative

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[10] Congress did not create "Article I adjuncts," Gov. Brief at 37, 38, but rather chose the "adjunct" court approach instead of creating Article I legislative courts. It should be noted that the Senate's attempt to resolve the constitutional difficulties by creating the bankruptcy courts as adjuncts to the Article III district courts was made without the benefit of this Court's decision in *United States v Raddatz*, *supra*, which clarified the constitutional limitations on the delegation of power from the district courts to non-article III assistants.

determination. *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858); *Burns, Stix Friedman & Co. v. Commissioner*, 57 T.C. 392 (1971).

The Department of Justice recognized these narrow limitations on the doctrine of legislative courts when it took the position before the House Committee on the Judiciary during consideration of the bankruptcy reform legislation that establishment of Article I bankruptcy courts would be unconstitutional. *See* Justice Dep't. Letter, *supra*, App. A at 4a-7a. Now, however, the Government suggests that there is "no constitutional principle that warrants singling out these two situations from others in which Congress also has plenary authority to legislate." Gov. Brief at 19. Quite to the contrary, the limitation of legislative courts to these two situations is mandated by the constitutional principles of federalism and separation of powers that underlie Article III's salary and tenure requirements, *Tidewater*, *supra*, at 628 (Rutledge, J., concurring), and that are violated by the bankruptcy courts' exercise of expanded jurisdiction.

B. The federal government's exercise of sovereign power in the territories and the District of Columbia does not support the creation of bankruptcy courts within the states having jurisdiction over laws of national applicability and matters of national concern.

The concept of "legislative courts" derives from the opinion of the Chief Justice Marshall in *American Insurance Co. v. 356 Bales of Cotton (Canter)*, 26 U.S. (1 Pet.) 511 (1828), in which the Court held that the exercise of judicial power pursuant to Article IV in the territories does not constitute the exercise of that "judicial power of the United States" defined by Article III. *Id.* at 546. Justice Marshall stated that although admiralty jurisdiction could be exercised "in the territories" by legislative courts created by virtue of the federal

government's sovereign power in the territories, admiralty jurisdiction can be exercised *in the states* in those courts *only* which are established pursuant to the 3rd article of the Constitution." *Id.* at 546 (emphasis added). *Canter*, therefore, directly refutes appellants' contention that the theory of territorial legislative courts supports the vesting of admiralty, equity, and common law jurisdiction in non-Article III courts within the states. None of the territorial court cases decided since *Canter* suggest otherwise. In *United States v. Coe*, 155 U.S. 76 (1894), the Court approved an untenured Court of Private Land Claims to the extent that the land claims arose within the Territory of Arizona and not in a state. *Id.* at 84-86. *See, e.g., Downes v. Bidwell*, 182 U.S. 244, 267 (1901) ("certainly no such court could be created within a state, except under the restrictions of the judicial clause") (Brown, J. concurring); *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899) (untenured Choctaw and Chickasaw Citizenship Court in Indian Territory); *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (unincorporated United States possessions); *In re Ross*, 140 U.S. 453 (1891) (Consular Court established in China for United States citizens).

Likewise in the District of Columbia, "[t]he restraints of federalism are . . . removed from the powers exercisable by Congress. . . ." *Glidden*, 370 U.S., at 581 (Harlan, J. concurring). There is in the District of Columbia, in contrast to the states, "no division of powers between the general and state governments. Congress has the entire control over the district for every purpose of government. . ." *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 619 (1838). The right of the federal government to exercise its sovereign power over local matters within the District by constituting non-Article III local courts was recently reaffirmed in *Palmore v. United States*, 411 U.S. 389 (1973). Under the District of Columbia Court Reform and Criminal Procedure Act of [July 29,] 1970, 84 Stat. 473, the Court of Appeals and

the District Court for the District of Columbia exercise only federal jurisdiction. The remaining local jurisdiction previously exercised by those courts was transferred to local courts presided over by non-Article III judges. Carefully noting that the District of Columbia residents still had access to Article III courts for normal 'federal' matters, *Id.* at 407, this Court held that the establishment of non-Article III courts to handle "local" matters constituted a permissible exercise of Congress' "police and regulatory powers" within the District. *Id.* at 397. The Court stated that since Congress has all the powers which a "state legislature or municipal government would have in legislating for state or local purposes,... [it] may vest and distribute the judicial authority in and among the courts and magistrates...as it may think fit..." *Id.*, quoting *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899).

Based on *Palmore*, appellants argue that since a lawsuit brought by a bankruptcy trustee against a nonparticipant in the bankruptcy proceedings may be heard before a non-Article III state judge, then there is no constitutional infirmity to having the same lawsuit heard before a non-Article III federal judge. This argument ignores the federalist structure of the Constitution. The statement in *Palmore* that citizens of both states and the District of Columbia who have violated local criminal laws are tried in local, non-federal tribunals before judges without tenure and salary guarantees, *Id.* at 410, merely emphasized that the Article III federalist restraints are not operative within the District of Columbia and thus, in the District, the federal government may establish non-tenured tribunals as may any other state. The federal government does not have the same powers in the states. In making the creation of inferior federal courts permissive, the Framers intended to preserve a wider field for state judicial power, not to permit Congress to expand federal judicial

power in the states in a manner inconsistent with Article III. *See* pages 15-17, *supra*. If a non-Article III federal court may try plenary lawsuits because such suits would otherwise be heard in a non-Article III state court, Gov. Brief at 33 n.22, then no constitutional objection exists to the vesting of all general federal question jurisdiction in non-Article III federal courts since, prior to 1875, all such cases were heard before non-Article III state court judges. Act of March 3, 1875, 18 Stat. 470. *See* C. Wright, *Law of Federal Courts* 5 (3d ed. 1976). Appellants' proposed reading of Article III requires acceptance of their premise that Article III and its underlying principles of federalism and separation of powers are "practically meaningless." *Raddatz*, 447 U.S. at 705 n.6 (Marshall, J. dissenting).

Appellants have also suggested that dictum in *Palmore* that Congress may create a non-Article III court in "specialized areas having particularized needs and warranting distinctive treatment" means that constitutional requirements may be disregarded whenever "practical considerations" would make a non-Article III court more economical or efficient.[11] Gov. Brief at 20-23, quoting *Palmore*, 411 U.S. at 404, 408. Appellants misinterpret this language to mean that Congress can dispense with Article III in creating a court for any one of the areas in which Congress can enact uniform national

[11] The reference to "practical considerations" in the *Palmore* opinion was not, contrary to the Government's suggestion, offered as a constitutional principle justifying the establishment of non-Article III courts. The phrase is found in a quotation from *Glidden v. Zdanok*, 370 U.S. at 547, which described the very narrow limits on Congress' power to create Article I courts. Justice Harlan spoke only of those "practical considerations" involved in territorial courts "arising outside the normal context of a federal system." *Id.* at 547. Justice Harlan stated that even in the territories, when practical considerations such as "the particular local setting, the practical necessities, and the possible alternatives" did not require it, the *Canter* holding allowing the creation of Article I courts outside of the states "has not been deemed controlling. *O'Donoghue v. United States* 289 U.S. 516, 536-539." *Glidden*, 370 U.S. at 547-48.

legislation. The holding in *Palmore* is not so broad. *See*, Justice Dep't Letter, *supra*, ("the context in which this phrase appears in *Palmore*...suggests strongly that what the Court intended by the use of 'specialized areas' was specialized geographical areas." App. A at 6a). *Palmore*, like prior cases upholding Article I courts, stands only for the proposition that in specialized areas where the principles of federalism and separation of powers do not constrain congressional action, Congress may establish courts outside of Article III. *See*, Note, *Masters and Magistrates*, 88 Harv. L. Rev. 779, 781-787 and n.55 (1975). In establishing local courts for the District of Columbia, Congress clearly acted within a special area where it is not bound by federalist constraints. *Palmore* emphasized, however, that the "requirements of Art. III...are applicable where laws of national applicability," like the bankruptcy, securities, antitrust and other federal statutory laws applied by the new bankruptcy courts, and where "affairs of national concern," like the large corporate reorganizations, "are at stake." *Id.* at 408. *See*, *O'Donoghue v. United States*, 289 U.S. 516 (1933) (courts handling general federal matters in District must be Article III courts); H.Rep. No. 135, 89th Cong., 1st Sess. 2 (1965); S.Rep. No. 1504, 89th Cong., 2nd Sess. 2 (1966) (federal litigants in Puerto Rico are entitled to Article III judges).

Neither *Palmore* nor any of this Court's prior decisions involving Congress' creation of courts pursuant to its sovereign power in the territories and in the District of Columbia support the establishment of non-Article III bankruptcy courts exercising full judicial powers and broad jurisdiction over "laws of national applicability" within each of the states.[12]

[12] The bankruptcy court in *Segara v. Banco Central Economias*, 14 Bankr. 870 (Bankr. D.P.R. 1981), which upheld the constitutionality of the

C. Unlike the exercise of limited judicial powers and jurisdiction by legislative courts within the states, the bankruptcy courts' exercise of full judicial powers over common law causes of action violates Article III's principles of federalism and separation of powers.

1. Federal legislative courts within the states have a far more tenuous foothold than legislative courts outside the states. Congress has explicitly created only two such courts, the Court of Military Appeals and the Tax Court.[13] This Court has recognized the right of Congress to establish legislative courts within the states only when such courts exercise limited powers and adjudicate matters arising between the Government and others. *Dynes v. Hoover*, 61 U.S.(20 How.) 65 (1858); *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929); *Williams v. United States*, 289 U.S. 553, 581 (1933). These decisions hold that since the federal legislative or executive departments have the power to act on certain subject matter involving federal sovereign power without any tribunal, the establishment of an adjudicative tribunal within those departments does not infringe upon the principles of federalism and separation of powers. A

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bankruptcy courts' expanded jurisdiction, based its holding on Congress' authority "to authorize nontenured territorial judges and nontenured state judges to . . . determine federally created rights." *Id.* at 344.

[13] Except for the Tax Court and military courts, all other federal courts within the states, all of which have jurisdiction far more limited than the bankruptcy courts, are constituted as Article III courts: United States Court of International Trade, 28 U.S.C. §251 (formerly United States Customs Court); the United States Court of Customs and Patents Appeals, 28 U.S.C. §211; the United States Court of Claims, 28 U.S.C. §171; Emergency Court of Appeals, Act of Jan. 30, 1942, c.26, §204(e), 56 Stat. 23, 32 (former 52 U.S.C.App. §924) (terminated April 18, 1962); Temporary Emergency Court of Appeals Act of December 22, 1971, 85 Stat. 743; and the Special Court, Regional Rail Reorganizational Act of 1973, 45 U.S.C. § 419. *See also* Act of June 18, 1910, c.309, 36 Stat. 539, 540 (United States Commerce Court).

comparison of the bankruptcy courts with existing Article I subject matter courts demonstrates that no executive or legislative tribunal within the states has ever been endowed with the breadth of judicial powers and jurisdiction granted to the bankruptcy courts.

The subject matter jurisdiction of the bankruptcy courts is not confined to the application of the bankruptcy law. "Examples of the reach of the jurisdiction of the new bankruptcy court could be multiplied *ad infinitum*. Conceptually, there is no limit to the reach of this jurisdiction...." 1 *Collier on Bankruptcy*, §3.01, p.49 (15th ed. 1980). Under their "related to" jurisdiction, 28 U.S.C. §1471(c), bankruptcy courts may entertain lawsuits requiring the application of the entire range of laws of national applicability, including securities, antitrust, labor law, banking, and civil rights suits.[14] Bankruptcy courts may also take jurisdiction over a range of claims by trustees that are traditionally matters of state law, including contract and tort claims as in the present case.[15] Bankruptcy courts may even render affirmative money judgments against a state on contract and tort claims, and enjoin state and municipal

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[14] *See, e.g., Total Communications Corp. v. Executone, et al.*, Adv. Proceeding No. 81-0423-VM (Bankr. D. Ariz.) (Clayton and Sherman Act claims as well as breach of franchise agreement, conversion and tort claims); *In re Unit Parts Co.*, 10 Bankr. 970 (Bankr. W.D. Okla. 1981) (labor law claims); *Maya v. Philadelphia Gas Works*, 8 Bankr. 202, 206-07 (Bankr. E.D.Pa. 1981) (civil rights claims); *Wright v. Credithrift of America*, 11 Bankr. 590 (Bankr. S.D. Miss. 1981) (Truth-in-Lending claims).

[15] *See, e.g., Watt v. State Farm Fire & Casualty Co., 8* BCD *266* (Bankr. W.D.Pa. 1981) (state insurance contract law claims), *Trim Cut Co. v. Beasley*, 4 Bankr. 243 (Bankr. D. Del. 1980) (violations of state corporate law); *Emerald City Records, Inc. v. First Media Corp.*, 9 Bankr. 319 (Bankr. N.D.Ga. 1981) (abuse of civil process). A bankruptcy court may also exercise a non-reviewable right to remove a case from any state or federal court in the country to the bankruptcy court, 28 U.S.C. §1478 — even a non-diverse state action to which the bankrupt is not even a party. *See, e.g., In Re Brothers Coal Co.*, 6 Bankr. 567 (Bankr. W.D.Va. 1980).

bodies, in derogation of the independence of the sovereign states and their agencies. *See generally* Plumb, *supra*, at 1470-74.

In addition to their almost limitless subject matter jurisdiction, bankruptcy courts have held that they are not bound by the "minimum contacts" requirement of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and that they may exercise personal jurisdiction over persons located anywhere within the United States under 28 U.S.C. 1471(c).[16] *See, e.g., Nixon Machinery Co. v. Roy Energy, Inc.*, 15 Bankr. 131 (Bankr. E.D.Tenn. 1981); *Beasley v. Kelco Foods, Inc.*, 11 Bankr. 1010 (Bankr. D.Del. 1981); *Whippany Paper Board Co. v. Victory Container Corp.*, 15 Bankr. 312 (Bankr. D.N.J. April 3, 1981); *Scott v. Fort Ord Federal Credit Union*, 5 Bankr. 220, 225 (Bankr. W.D.Tenn. 1980); *Line by Dakota, Inc. v. Lebsack*, 8 Bankr. 643 (Bankr. D.S.D. 1981). Indeed, in the present case, Marathon is a Delaware corporation, with its principal place of business in Findlay, Ohio, which does not carry on business in Minnesota and is not amenable to suit in Minnesota state or federal district court.[17] This exercise of nationwide personal jurisdiction over actions to

[16] Bankruptcy courts obtain personal jurisdiction over persons anywhere in the country with service of process by U.S. Mail. Bankruptcy Rule 704. The Department of Justice opposed the expansion of jurisdiction because it thrusts state cases into federal court and would encourage forum shopping. House Hearings, *supra*, at 2097-98 (statement of Richard Lavine, Ass't. Attorney General). Forum shopping may well be encouraged by this extended jurisdiction since insolvency is no longer a requirement to file a petition for reorganization. *Compare* former 11 U.S.C. §§530, 723, 823 with 11 U.S.C. §§301, 1121. Any corporation may, simply by filing a petition, obtain nationwide jurisdiction in a local tribunal for any claim it may have. Similarly, creditors may place a company into involuntary bankruptcy in order to get nationwide jurisdiction over guarantors of the bankrupt corporation.

[17] In proceedings before the bankruptcy court, counsel for Northern filed an affidavit which stated, inaccurately, that appellee Marathon was authorized to do business in Minnesota. Affidavit, dated June 19, 1980. Northern's counsel relied upon the certificate of authority to do business

enforce claims not related to the core federal bankruptcy function of recovering and distributing property or funds which were part of the bankrupt's estate violates both the principle of comity that governs federal-state court relations and the traditional concepts of fairness and substantial justice that have, prior to the Reform Act, limited the exercise of federal personal jurisdiction. *See* Note, *Bankruptcy and the Limits of Federal Jurisdiction*, 95 Harv.L.Rev. 703, 706-711, 713-715 (1982) (hereinafter "Harvard Note").

In contrast, the two Article I subject matter courts created by Congress have exercised extremely limited powers and jurisdiction. Currently, the United States Court of Military Appeals and the courts-martial it governs are the only Article I subject matter courts whose constitutionality has been upheld by this Court. *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1858); *O'Callahan v. Parker*, 395 U.S. 258 (1969). Military courts do not infringe upon the principle of separation of powers because the courts' limited function "to maintain discipline in order to carry on their 'primary . . . function' of fighting or being ready to fight wars," *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955); *O'Callahan*, 395 U.S. at 262-66, has been entrusted solely to the President as Commander-in-Chief and to Congress through its power to declare war, raise armies and "make Rules for the Government and Regulation of the land and Naval forces." U.S. Const. art. I, §8, cl. 14. The military courts have never been considered part of the judiciary, but are agencies of the executive branch, whose decisions are subject to various forms of executive approval and revision, 10 U.S.C. §§864, 871, 872, 874, and, within the limits of their jurisdiction, cannot be controlled or reviewed by civil courts. *See*, *Dynes*, 61

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of a Nevada corporation, not the Delaware corporation which is the defendant-appellee in the present matter. *See* Recording of Proceeding before Bankruptcy Court on June 20, 1980.

U.S. at 79; *Kurtz v. Moffitt*, 115 U.S. 487, 500 (1885); C. Wright, *Law of Federal Courts* 13 (3d ed. 1976). The jurisdiction of military courts is limited to violations of the Uniform Code of Military Justice, and the courts' powers are limited to "the least possible power adequate to the end proposed." *Toth*, 350 U.S. at 23. This Court has repeatedly held unconstitutional attempts of military courts to "encroach on the jurisdiction of the federal courts set up under Article III of the Constitution", *id.* at 15, by expanding their jurisdiction beyond the "narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." *O'Callahan*, 395 U.S. at 266 (1969); *Toth*, *supra*; *Reid v. Covert*, 354 U.S. 1 (1957); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

The only other Article I court acting within the states is the United States Tax Court. The constitutionality of this court, although questioned,[18] has never been ruled upon by this Court. In an unappealed decision affirming its own status, *Burns, Stix Friedman & Co. v. Commissioner*, 57 T.C. 392, 396 (1971), the Tax Court, which until 1969 had been "an independent agency in the Executive Branch of the Government", *Id.* at 392, noted that the Tax Court did not infringe upon the separation of powers principle since "'[t]he right of the United States to collect its internal revenue by summary administrative proceedings has long been settled.' *Phillips v. Commissioner*, 283 U.S. 589, 595 (1931)." *Burns*, 50 T.C. at 398. The Tax Court's narrow jurisdiction is "limited to redetermining deficiencies in Federal income, estate, and gift taxes" based upon the Internal Revenue Code. *Id.* at 396. *See also, Continental Equities, Inc. v. Commissioner*, 551 F. 2d 74, 79, 82-84 (5th

[18] *See, e.g.*, Ginsberg, *Is The Tax Court Constitutional?*, 35 Miss. L.J. 382 (1964); Dubroff, *Federal Taxation*, 1973-74 *Ann. Survey of Amer. L.* 265, 272-85 (1974).

Cir. 1977) (no equitable jurisdiction). Not only is the jurisdiction of the court limited, but, unlike the bankruptcy courts, its judicial powers are limited:

> The court presently has no jurisdiction to execute its decision; it does not render a money judgment; it simply determines the amount of the deficiency or overpayment of tax. . . . It has no jurisdiction to exercise the broad common law concept of "judicial power" invested in courts of general jurisdiction by Article III of the Constitution.

Id. at 396.

Furthermore, the Tax Court's limited jurisdiction is entirely consensual. Unlike involuntary defendants in plenary lawsuits before the bankruptcy courts, the taxpayer, by first paying the deficiency and then bringing suit against the government in a United States district court or the Court of Claims, *id.* at 394 n. 7, retains an absolute right to adjudication of his dispute before an Article III tribunal.[19]

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[19] The only other courts ever considered Article I courts acting within the states are the Court of Claims and the Court of Customs and Patent Appeals. *Ex parte Bakelite*, 279 U.S. 438 (1929); *Williams v. United States*, 289 U.S. 553 (1933); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). The changing jurisdiction of these courts and Congress' failure to explicitly denominate them Article III courts until the 1950's resulted in confusion over their status until it was finally settled in *Glidden*, *supra*. Both *Bakelite* and *Williams*, drawing on the "public rights" limitation in *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856), rested on the ground that the collection of duties and payment of claims by the federal government involved the exercise of sovereign power "which may be devolved at the will of Congress upon any of the three departments [and] plainly is not within the doctrine of the separation and independent exercise of governmental powers contemplated by the tri-partite distribution of such powers." *Williams*, 289 U.S. at 581. Justice Harlan, writing for a three-judge plurality in *Glidden*, impliedly overruled *Bakelite* and *Williams* and held that the Court of Claims and Court of Customs and Patent Appeals have been Article III courts since their creation. *Glidden*, *supra* at 584. Justice Clark and Chief Justice Warren, concurring, held that the courts became Article III courts

The Constitution does not, as appellants suggest, give Congress great latitude to establish non-Article III federal courts within the states. Historical practice and decisions of this Court demonstrate that it is only in matters involving the power of the sovereign to conduct war, collect taxes or to determine claims against the sovereign — that is, where pure executive or legislative determination does not infringe upon the principle of separation of powers — that Congress may establish non-Article III federal tribunals within the states. At no time in this country's history, however, have bankruptcy proceedings, much less lawsuits initiated by bankruptcy trustees against non-participants in the bankruptcy proceedings, been considered amenable to executive or legislative determination. *See* Katz, *Federal Legislative Courts*, 43 Harv.L.Rev. 894, 916 (1930). Indeed, it has long been recognized that jurisdiction over suits at law and in equity and admiralty may not be delegated to the legislative or executive departments. In *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856), this Court stated:

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can ... withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.

Id. at 284.

If the final judicial determination of suits between private parties based on state common law contract,

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through the expansion of appellate jurisdiction over matters previously heard in Article III courts and the removal of congressional and executive reference jurisdiction. *Id.* at 585-589.

tort or property claims and the enforcement of monetary or equitable judgments can be entrusted to a legislative or executive officer of the federal government, then there would appear to be no disputes which the federal executive or legislature could not finally determine and enforce in any manner they chose.[20] This is precisely the tyranny of consolidated federal power that the Framers sought to avoid in drafting Article III. The power to pass uniform legislation in limited areas granted by the states to the Congress was never intended to permit such a wholesale appropriation of judicial power by the other branches of the federal government. As both the House Committee on the Judiciary and the Department of Justice concluded, the power to enter and enforce final judgments in the states in all cases "related to" a bankruptcy proceeding cannot constitutionally be vested in the legislative or executive branches of the federal government. *See* House Report, *supra*, at 32, 49; Justice Dep't. Letter, App. A, at 1a-7a. *See also*, Plumb, *supra*, at 1457-69.[21] The vesting of such jurisdiction in a legislative court would "sap the

[20] If Congress' power to create non-Article III federal courts were coextensive with its power to enact legislation, then it "could circumvent entirely the restrictions of Article III simply by establishing a series of untenured, limited jurisdiction courts, such as criminal courts, antitrust courts, labor courts and environmental courts." Krattenmaker, *supra*, at 310. *See Tidewater*, 350 U.S. at 611 (Rutledge, J., concurring) 652 n.3 (Frankfurter J., dissenting); House Report, *supra*, at 86 (letter of H. Wechsler).

[21] While the exercise of expanded jurisdiction by a bankruptcy judge is unconstitutional, under the Reform Act the trustee or debtor may still prosecute any claims he may have in any state or federal district court with jurisdiction over the parties. 11 U.S.C. §323(b); Bankruptcy Rule 610. Thus, affirmance of the district court below would result only in a requirement that a trustee sue a non-participant in the bankruptcy proceedings in an appropriate state or federal court.

judicial power as it exists under the Federal Constitution, and [would] establish a government of a bureaucratic character alien to our system." *Crowell v. Benson*, 285 U.S. 22, 57 (1932).

2. Even assuming for the sake of argument that jurisdiction over claims arising under state laws and laws of national applicability may be vested in the legislative branch of government, the breadth of the jurisdictional grant to a legislative tribunal is neither justified by the needs of the administration of the bankruptcy laws nor basically sound:

> "The bill pours all sorts of litigation into the federal system that belongs in the state courts, and the bankruptcy courts would, in addition, end up deciding all kinds of cases only tangentially related to the bankruptcy laws. In the latter event, bankruptcy expertise is irrelevant and bankruptcy judges are not likely to be well trained in these other fields. For example, the prospect of trying antitrust suits before Article III bankruptcy courts is a bad idea from anyone's standpoint, except, perhaps from the standpoint of bankruptcy lawyers who may appreciate the new business."

House Report, *supra*, at 544 (Additional view of Hon. George E. Danielson, quoting remarks of the Judge Shirley M. Hufstedler).

Fourteen-year terms do not result in more flexibility in meeting an unlikely decrease in the bankruptcy caseload since the average term of Article III judges is 12.1 years. *See* Brief of Amicus of Association of the Bar of the City of New York, Appendix A; Subcommittee Report, *supra*, at 18 n.44. Nor does the need to alleviate bankrupts from the expense of litigating in distant forums justify tampering with the fundamental structure of the American judicial system by creating non-Article III federal courts in the states. A far less drastic solution would be simply to change the venue

requirements of federal district courts to allow trustees to bring a plenary action in the federal district court in the district in which the bankruptcy proceeding is pending.[22]

The splintering of federal court jurisdiction by the creation of specialist trial and appellate courts having overlapping jurisdiction with state and other federal courts encourages forum shopping and "is fundamentally undesirable and contrary to all experience of the past 50 or more years." Judicial Conference of the United States, *Preliminary Report of the Special Committee to Review HR 6, 95th Congress, A Legislative Proposal Relating to Bankruptcy Administration* 6 (April 15, 1977). *See also*, ABA Commission on Standards of Judicial Administration, *Final Draft of Standards Relating to Court Organization*, Standards 1.10, 1.11.

Finally, the independence of the bankruptcy judges and the delicate balance of judicial power between the United States and the several states are matters of "intensely practical" importance. *Glidden v. Zdanok*, 370 U.S. at 589 (Douglas, J., dissenting). Disruption of the balance of power governed by the principles of federalism and comity, *see* Harvard Note, *supra* at 706-13; *see generally*, *Younger v. Harris*, 401 U.S. 37, 44-45 (1971), and the compromise of the complete independence of federal judges who handle matters of national concern cannot be justified on the grounds of efficiency:

> "There is a recurring temptation to view questions of federal jurisdiction as if they were simple procedural questions, to be resolved in whatever fashion will best serve the desirable goal of efficient judicial administration. Settled doctrine does give some

[22] The Reform Act still requires that many bankruptcy-related proceedings be brought in potentially distant forums. *See* 28 U.S.C. §1473(b), (d), and (e).

> play to such considerations. But when it is remembered that the delicate balance of a federal system is at stake and that expansion of the jurisdiction of the federal courts diminishes the power of the states, it is apparent that efficiency cannot be the sole or the controlling consideration."

C. Wright, *Law of Federal Courts* 2 (3d ed. 1976). *See also, Reid v. Covert*, 354 U.S. 1 (1955) ("[S]tealthy encroachments" on "government of divided authority" cannot be justified on ground that "practical necessity for [slight expansion of jurisdiction] is very great." *Id.* at 39, 40).

D. The bankruptcy courts are not an administrative agency but courts exercising full judicial power over a broad range of subject matter.

Appellants finally contend that the bankruptcy courts may be sustained as an administrative agency. The simple answer is that Congress did not create a bankruptcy administrative agency. Even if Congress had attempted to create such an agency, it could not have empowered the agency to enter final judgments;[23] to conduct jury trials, *see*, House Report, *supra*, at 38 n.248, and 1 Davis, *Administrative Law* §3.10, p. 182 (2d ed. 1978); to issue writs of habeas corpus to free persons who are in the custody of state or federal prisons, *see Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C. J., concurring); to enforce their own monetary awards, subpoenas or legal process without recourse to a constitutional court, *see* Subcommittee Report, *supra*, at 31; *ICC v. Brimson*, 154 U.S. 447, 479,

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[23] In *Crowell v. Benson*, 285 U.S. 22 (1932) this Court held that Article III required a *de novo* review in the district court of contested facts upon which the liability of the defendant in that case depended. The absence of Article III *de novo* redetermination of decisions of the bankruptcy courts violates the principle enunciated in *Crowell* and *Raddatz*, *supra*.

485 (1894); and to exercise all these powers in common law disputes between private citizens.[24] No administrative agency has ever been granted pendent jurisdiction over state law claims against a non-participant in agency proceedings or the broad jurisdiction and full judicial powers purportedly vested in the bankruptcy courts.

CONCLUSION

The purported exercise of expanded jurisdiction by the non-Article III bankruptcy judge over Marathon and the present common law contract and tort claims under 28 U.S.C. §1471(c) violates Article III and its underlying principles of federalism and separation of powers. Therefore, the district court's order dismissing Northern's complaint should be affirmed.

Respectfully submitted,

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[24] In a recent review of the doctrine of *Crowell v. Benson*, *supra* and related cases sustaining administrative fact-findings, this Court stated:

> "Our prior cases support administrative fact-finding in *only* those situations involving 'public rights', *e.g.*, where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. *Wholly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated.*"

Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. 442, 458, (1977) (emphasis added). The dictum in *United States v. Kras*, 409 U.S. 434, 447 (1973) that Congress might remit certain aspects of bankruptcy proceedings to an administrative agency is not applicable to the instant suit at common law and is inconsistent with *Murray's Lessee*, *supra*, and *Atlas Roofing*, *supra*, decided four years after *Kras*.

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MARCH 1982

APPENDIX A

Assistant Attorney General
Legislative Affairs

DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

June 14, 1977
July 17, 1977

Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

We understand that your Committee will soon begin marking up H.R. 7330, a bill "To establish a uniform Law on the subject of Bankruptcies." Set forth below are a number of problems which this Department has with this most important piece of legislation.

1. *Article III Status of Bankruptcy Courts*

Although the Department continues to be opposed to the creation of Article III status for bankruptcy courts, we no longer support suggestions that bankruptcy courts be established as independent courts under Article I of the Constitution. In a March 16th letter to Subcommittee Chairman Don Edwards on H.R. 6, this Department stated that it preferred that independent bankruptcy courts be established under Article I rather than Article III. However, a subsequent study of the question of the constitutionality of an Article I bankruptcy court has indicated that the Department cannot, in the context of the present legislative record, support the constitutionality of such a court. This study, prepared by the Department's Office of Legal Counsel, is attached as an appendix to this letter.

It would, however, be unwise, and unnecessary in the Department's opinion, to erect a parallel to the existing

district court structure in the form of Article III bankruptcy courts which would have broader jurisdiction than the district courts. The judicial power of the United States, conferred by Article III of the Constitution, is a formidable power which must be conserved and to the maximum extent possible reposed in a single set of traditional and generalized district courts. To delegate or expend this power unnecessarily will be inevitably to dilute its prestige and influence. The number of district and circuit courts is presently expanding under the pressures of increased workload. To the extent however that complex and specialized functions such as bankruptcy, can be handled within the historical generalized jurisdiction of the district courts, the Department believes this should be accomplished. District courts must of course be increasingly aided in utilizing adjunct masters, referees, magistrates to help them perform their duties. We therefore believe that bankruptcy jurisdiction, acknowledging its specialized nature, should continue to be performed by district judges with the aid of competent bankruptcy referees.

[sections on United States Trustees, government claims, tax provisions and exempt property deleted]

Sincerely,

Patricia M. Wald
Assistant Attorney General

APPENDIX

You have requested our views on three Constitutional questions raised by H.R. 7330. These questions are: (1) may the powers which the bill vests in the judges of the newly created bankruptcy courts be vested in an Art. I ("legislative") court or must they be vested in an Art. III court; (2) may these powers be vested in existing

bankruptcy judges who do not have life tenure but who operate as adjuncts of the district courts under the existing judicial machinery for the adjudication of bankruptcy cases; and (3) may the proposed United States Trustees established by the bill be appointed and supervised by the judiciary, through the Administrative Office of the United States Courts, or does the Constitution require that they be appointed and supervised by the executive branch.

The bankruptcy courts proposed to be established by H.R. 7330 have certain enumerated powers, including exclusive plenary jurisdiction over bankruptcy cases, nationwide process, and the power to enjoin state court proceedings concerning the bankrupt. While H.R. 7330 proposes to establish these courts as Art. III courts, whose judges enjoy, under the Constitution, life tenure and protection against diminution in salary, we have been asked for our views as to whether the proposed courts, or similar courts, could be established under Art. I of the Constitution. Although the matter is not entirely free from doubt, it is our opinion that, based on the facts and circumstances disclosed in the various extensive studies of the bankruptcy laws and their administration, the proposed bankruptcy courts cannot be created as Art. I courts.

Art. III, sec. 1 provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Nevertheless, despite the apparent exclusivity of the grant of the Federal "judicial power" in Art. III, the

Supreme Court has, in certain circumstances, upheld the authority of Congress to create "legislative courts" whose judges do not enjoy the protections provided by Art. III.

These cases fit into a number of fairly definable categories. The first broad category encompasses special geographic areas over which Congress exercises plenary power. Thus, with respect to the territories, over which Congress exercises plenary authority equivalent to the power of a state legislature, the creation of legislative courts has been upheld, *American Insurance Co. v. Cantor*, 1 Pet. 511 (1828), and this result extends to other areas over which Congress had total sovereignty: unincorporated areas outside the continental United States, *Downes v. Bidwell*, 182 U.S. 244 (1901); *Balzac v. Porto Rico*, 258 U.S. 298 (1922); and the District of Columbia, *Palmore v. United States*, 411 U.S. 389 (1973). Based upon similar reasoning, the Supreme Court has upheld the creation of a legislative court to determine private land claims in one of the territories, *United States v. Coe*, 155 U.S. 76 (1894) and to determine questions of tribal membership relevant to claims within Indian territory, *Stevens v. Cherokee Nations*, 174 U.S. 445 (1899); *Ex parte Joins*, 191 U.S. 93 (1903).

The second category is with respect to the military where the Supreme Court, relying on Congress' Constitutional authority to "make Rules for the Government and Regulation of the land and naval Forces," Art. I, sec. 8, cl. 14, has upheld the authority of non-Art. III military courts to try members of the armed services accused of "service connected" crimes. *Relford v. Commandant*, 401 U.S. 355 (1971); *O'Callahan v. Parker*, 395 U.S. 258 (1969).

The third category consists of courts established to adjudicate disputes between citizens and the Government which "from their nature do not require judicial determination and yet are susceptible of it." *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 91929). Because these

claims could be reserved to Congress itself or committed exclusively to the executive branch for resolution, Congress was also held to have the power to submit the matter to a legislative court.

The final relevant precedent is *Crowell v. Benson*, 285 U.S. 22 (1932), in which the Court sustained the authority of an administrative agency to adjudicate workmen's compensation claims, which were disputes between private parties, subject to judicial review. While *Crowell* might be considered authority for committing any case within the judicial power to an administrative agency so long as review of the legal issues is provided in an Art. III court, in *Atlas Roofing Co. v. Occupational Safety & Health Review Committee*, 45 U.S.L.W. 4312 (U.S. Mar. 23, 1977) the Supreme Court expressed a narrow view of *Crowell*, indicating that only some, largely undefined, adjudicatory functions can be performed by administrative agencies subject to judical review. *Id.* at 4314 n. 7.

Leaving the *Crowell* case aside, it is apparent that the proposed bankruptcy courts, whose jurisdiction involves primarily the litigation of claims of private right, do not fall within any of the previously defined situations in which the creation of a legislative court has been upheld. An analysis of the Supreme Court's most recent decision concerning the creation of legislative courts indicates that the proposed bankruptcy court cannot be created as an Art. I court. In *Palmore v. United States, supra*, Palmore was tried and convicted of a crime in the Superior Court of the District of Columbia, an Art. I court whose judges did not enjoy Art. III tenure protection. Palmore sought Supreme Court review on the ground that he was entitled to be tried before an Art. III judge. The Supreme Court rejected this contention:

> [T]he requirements of Art. III, which are applicable where laws of national applicability and affairs

> of national concern are at stake, must in proper circumstances give way to accomodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment. 411 U.S. at 407-408.

Applying this test, the Court concluded that the District of Columbia's particularized needs, which had been characterized as a judicial crisis, * coupled with Congress' plenary power over the District of Columbia, supported the creation of a non-Art. III court to perform functions essentially similar to those of state courts, *i.e.*, the trial of cases arising under local law, thereby freeing the District's Art. III courts to "try cases arising under the Constitution and the nationally applicable laws of Congress." 411 U.S. at 409.

The language quoted above, approving the creation of Art. I courts "with respect to specialized areas having particularized needs . . .," is ambiguous in that it could be read as referring to either specialized areas of substantive law (in *Palmore* "local law;" here, "bankruptcy law") or to special geographical areas, *i.e.*, the District of Columbia. The context in which this phrase appears in *Palmore* — following an extended discussion of the nature of Congress' power over the District of Columbia (*id.* at 397-400), the role of territorial courts (*id.* at 402-04), and the fact that the matters heard in Superior Court were strictly of "local concern" (*id.* at 407) — suggests strongly that what the Court intended by the use of "specialized areas" was specialized geographical areas. While it may well be that *Palmore*, however read, does not close the door to the creation of Art. I courts of

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* Unhappily, the Court's analysis fails to come to grips with the nature of the "particularized need" in *Palmore* which justified the use of an Art. I rather than an Art. III court. Court congestion is as susceptible to amelioration by the appointment of Art. III judges as by creation of a new Art. I court.

a type not heretofore considered, it is clear that in such a case a peculiar and compelling need to avoid the tenure provisions of Art. III must be found by Congress, a need which, based upon the existing extensive studies of bankruptcy administration, appears to be lacking here. Thus, upon the present state of the record, regardless of how *Palmore* is read, the Constitution requires that the bankruptcy court contemplated by H.R. 7330 be an Art. III court.

The second question is whether the powers which H.R. 7330 proposes to grant to the judges of the proposed bankruptcy court may be exercised by the existing bankruptcy judges, who do not enjoy life tenure, under the general supervision of District Court judges. It appears to us that these powers can be exercised by the existing bankruptcy judges who are adjuncts of the district courts. *Cf. Atlas Roofing Co. v. Occupational Safety & Health Review Committee*, 45 U.S.L.W. 4312, 4314 n. 7, (U.S. Mar. 23, 1977). This conclusion is supported by a number of arguments: first, in the seventy-nine years of practice under the existing Bankruptcy Act, no serious judicial challenge to the Constitutionality of the present system has been made and the historical use of referees (then called commissioners) in bankruptcy extends back to the Bankruptcy Act of 1800, Act of April 4, 1800, 2 Stat. 19, repealed by the Act of Dec. 12, 1803, 2 Stat. 248. Second, under the 1973 Bankruptcy Rules, promulgated by the Supreme Court, 415 U.S. 1003 (1973), the then existing role of the bankruptcy judge as a de facto trial judge was recognized, *e.g.*, Rule 901(7) (title changed from referee to bankrupt judge), Rules 801-05 (providing appeal to District Court rather than review) Rule 810 (establishing "clearly erroneous" standard for reversal of bankruptcy judge's factual determinations). Because these Rules were promulgated by the Supreme Court, the final arbiter of the meaning of the Constitution, it seems fairly clear that the existing rules and the

existing powers granted to bankruptcy judges must be Constitutional. See *Hanna v. Plummer*, 380 U.S. 460 (1965). Expansion of the powers of the existing bankruptcy judges in the manner contemplated by H.R. 7330 does not appear to be a sufficiently radical change as to render the continuation of the existing system of bankruptcy judges unconstitutional. The transition provisions in title IV of H.R. 7330, which provide that the existing bankruptcy judges shall exercise until 1983 the powers and jurisdiction of the proposed bankruptcy courts which will come into being at that time, except for a limitation on the power to enjoin state court proceedings and to punish certain contempts, appears to be in accord with this view.

[discussion of U. S. Trustees deleted]

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Nos. 81-150, 81-546

IN THE

Supreme Court of the United States

October Term, 1981

NORTHERN PIPELINE CONSTRUCTION CO.,
Appellant,

vs.

MARATHON PIPELINE COMPANY and
UNITED STATES OF AMERICA,
Appellees,

UNITED STATES OF AMERICA,
Appellant,

vs.

MARATHON PIPELINE COMPANY and
NORTHERN PIPELINE CONSTRUCTION CO.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

REPLY BRIEF FOR APPELLANT NORTHERN PIPELINE CONSTRUCTION CO.

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REPLY BRIEF FOR APPELLANT NORTHERN PIPELINE CONSTRUCTION CO.

I. INTRODUCTION

This reply brief is submitted on behalf of appellant Northern Pipeline Construction Company ("Northern") in response to the arguments made in the brief of appellee Marathon Pipeline Company and in the brief of *amicus curiae* Beneficial Corporation in support of appellee.

Both the appellee and the *amicus* argue that the Bankruptcy Reform Act unconstitutionally vests Article III judicial power in a court lacking Article III tenure and salary requisites. Additionally, appellee and *amicus* argue that the Reform Act's creation of bankruptcy courts as adjuncts to the District Courts is constitutionally inadequate in light of Article III requirements.

In reply, appellant Northern will restrict its discussion of these issues to the Article I-Article III controversy.

II. APPELLEE AND ITS *AMICUS* HAVE IGNORED OR MISCHARACTERIZED THE POSITION OF APPELLANT NORTHERN IN THIS APPEAL.

Neither appellee nor *amicus* has addressed the arguments of appellant Northern directly; *amicus* actually has wholly mischaracterized the position of appellant Northern. The position of appellant Northern, as set forth in its brief, can be summarized as follows:

1. The Constitution allows Congress to create legislative courts under Article I as well as inferior federal courts which exercise the "judicial power of the United States" under Article III.

2. Article I courts may not receive Article III "judicial power" and do not exercise the "judicial power of the United

States;" rather, their exercise of judicial powers is done pursuant to their Article I authority.

3. Article I courts and Article III courts can be distinguished by their scope of jurisdiction; Article I courts are granted only limited or special jurisdiction, whereas Article III courts enjoy much broader "general jurisdiction."

4. The bankruptcy courts are courts of specialized or limited jurisdiction and are properly constituted Article I legislative courts.

5. The bankruptcy courts' exercise of judicial powers can be undertaken only within the limited jurisdiction conferred upon them as Article I courts. That exercise does not conflict with the Article III "judicial power."

It is remarkable that neither appellee nor its *amicus* has addressed this argument directly. It is more remarkable that the appellee's *amicus* could state, as it does at page 6 of its brief, that appellant Northern does not appear to seriously challenge the conclusion that the bankruptcy courts have been vested with the judicial power of the United States as defined in Article III, Section 2. This is the very point of appellant Northern's position; i.e., that the bankruptcy courts do not exercise the "judicial power of the United States."*

* It is interesting to note that amicus, while mischaracterizing appellant Northern's position, itself takes a contradictory position with respect to this issue. Referring to decisions regarding the Court of Customs and Patent Appeals and the Court of Claims, amicus states: "Those decisions provide no basis for the assumption that the judicial power of Article III may be vested in a non-tenured court. They rest, rather, on the fact that the matters committed to those courts did not necessarily fall within the judicial power, as defined in Article III, at all" (Am. 20). References to appellee's brief are cited herein as "Ap. ," references to its amicus' brief are cited herein as "Am. ."

III. THE ARGUMENTS ADVANCED BY APPELLEE AND *AMICUS* ARE UNPERSUASIVE.

A. Bankruptcy Courts Do Not Exercise the Full Panoply of Judicial Powers As Courts of General Jurisdiction.

Both appellee and *amicus* argue that bankruptcy courts have been given virtually all of the powers of the federal courts and that bankruptcy courts exercise the full panoply of judicial powers. (Ap. 31; Am. 6). Such an assertion ignores the essential distinction between the bankruptcy courts created by the Reform Act and the nature of inferior federal court jurisdiction or the jurisdiction of "courts of general jurisdiction."

The bankruptcy courts created by the Reform Act may determine any controversy *only* if there is a bankruptcy. The bankruptcy court cannot entertain any claim for relief in the absence of a bankruptcy while inferior federal courts created under Article III may exercise their judicial powers without regard to any such precondition or limitation, *i.e.*, as in the case of courts of general jurisdiction.*

The bankruptcy courts as Article I courts do not act as courts of general jurisdiction. Rather, they can entertain no action or controversy unless and until a bankruptcy occurs. Only after that precondition has been satisfied may a bankruptcy court determine actions "related to" the bankruptcy. Even then, the court's judicial powers are not as extensive as an Article III court's powers.**

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* Appellee's and its amicus' argument that all cases or controversies "arising under" the laws of the United States require decisions by an Article III judiciary (Ap. 19; Am. 11) is patently erroneous. Validly constituted legislative courts have always determined questions "arising under" the laws of the United States. The Tax Court and Court of Military Appeals every day decide disputes "arising under" federal law.

** See appellant Northern Brief at 21; appellant United States of America's Brief at 5.

B. Congress Did Not Reject Article I Status for the Bankruptcy Courts.

Both the appellee and *amicus* argue that Congress specifically rejected Article I status for the bankruptcy court. (Ap. 31; Am. 4). This argument is premised upon the fact that Congress did not employ specific language in the Act stating that the bankruptcy court was created under Article I and, further, upon the argument that by styling the bankruptcy court as an adjunct to the District Court Congress recognized that the court would be exercising the judicial powers of Article III. Neither of these assertions is persuasive or determinative of the question as to whether the bankruptcy courts are properly constituted Article I courts, however.

As has been noted in the appellants' briefs, at the time the Reform Act was under consideration by Congress, there was a wide divergence of opinion concerning whether a bankruptcy court of the kind contemplated could be validly created under Article I or whether such court had to be created under Article III. Some scholars and commentators indicated that Article I status would be appropriate while others reasoned that such a court could only be created under Article III; and still others could provide no opinion at all based upon their view of the state of the law. Congress, faced with the various contradictory and inconsistent views of the scholars and commentators, obviously attempted to reach a solution which it felt resolved those contradictory positions.*

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* Appellee and the amicus attempt to raise the specter of a willful Congress bent on the piecemeal destruction of the inferior federal judiciary (Ap 20; Am. 14). They argue in effect that if the Bankruptcy Reform Act and the grant of jurisdiction to the bankruptcy courts are upheld, Congress will feel compelled to create specialized courts to hear all of the matters within the government's enumerated powers in Article I, §8. Such an intent and action on the part of Congress, however, cannot be inferred.

Prior to enactment into legislation, each of the bills in the House and Senate dealt with this subject very differently. The House bill (H.R. 8200) would have created an independent bankruptcy court under the auspices of Article III and would have provided Article III judges with lifetime tenure and salary guarantees. The Senate Bill (S. 2266), on the other hand, proposed the establishment of a new bankruptcy court as an adjunct of the U.S. district court, with judges appointed to 12-year terms.

The Senate Report outlines the alternatives it considered with respect to this issue:

> A considerable body of opinion has developed in support of the establishment of a bankruptcy court separate from the United States district court, either as an Article III court modeled after the present district court, as a separate Article I court patterned after the U.S. Tax Court, or as a hybrid court consisting of an Article I bankruptcy trial court appended to an Article III court of bankruptcy appeals. S. Rep. No. 95-989, 95th Cong., 2d Sess. 15, 16 (1978).

The ultimate result reached by both Houses of Congress, of course, more closely reflects the Senate version, or "a hybrid court consisting of an Article I bankruptcy trial court appended to an Article III court." The House version—with a separate Article III judiciary—was expressly rejected in the final legislation.

A fair reading of the legislative history reflects a compromise approach to a perceived constitutional problem known to the Congress. By creating the bankruptcy court as an adjunct to the District Court, Congress sought to provide a role for Article III courts in the administration of the bankruptcy

laws while at the same time creating the bankruptcy courts as Article I courts. It is clear upon any reasonable reflection that by using such a hybrid approach Congress indeed recognized that it was creating a legislative court and not an Article III court.

C. Appellee's Attempts to Distinguish and Limit *Canter* and *Palmore* Are Incorrect.

Appellee's limited interpretation of *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828), and *Palmore v. United States*, 411 U.S. 389 (1973), cannot be reconciled with other decisions of this Court. For example, appellee explains *Canter* as simply an exercise of the government's sovereign power in the territories (Ap. 33). This neat distinction, however, does not square with the Court's later decisions in *United States v. Coe*, 155 U.S. 76 (1894), upholding an untenured private land claims court exercising jurisdiction in certain western states and territories, and *Ex parte Bakelite Corporation*, 279 U.S. 439 (1929). Although *Coe* on its facts was limited to a claim arising in the territory of Arizona, the Court in *Ex parte Bakelite* made it clear that the decision in *Coe* would apply as well to lands within the states. 279 U.S. at 415. Moreover, this limited interpretation of *Canter* also overlooks the practical effect of *Crowell v. Benson*, 285 U.S. 22 (1932), in which a legislative court's authority to make awards to persons injured in the course of maritime employment was upheld.

The argument advanced by both appellee and *amicus* with respect to *Palmore* likewise is unpersuasive. In *Palmore* this Court determined that Article III requirements "must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized

areas having particularized needs and warranting distinctive treatment." 411 U.S. at 98. Appellee and *amicus* interpret and limit the term "specialized areas" to geographic areas. The better interpretation, however, is that the term encompasses substantive legal areas (such as tax and bankruptcy) which Congress properly has determined have particularized needs and require distinctive treatment.

Congress, following its exhaustive study of the bankruptcy area and in enacting the Reform Act concluded that bankruptcy is such a "specialized area." As the House Report recognized,

> The bankruptcy court system continues to operate today despite an antiquated law that limits its effectiveness. The increasing burden being placed on the system demands that the system be made workable and efficient before the burden becomes intolerable. H. Rep. No. 95-595, 95th Cong., 1st Sess. 52 (1977).

Having made such determination, Congress' solution of providing for a specialized Article I bankruptcy court appended to and supervised by Article III courts reflects a wholly reasonable, and constitutionally permissible, approach.

This hybrid approach adopted by the Congress represents a practical, deliberate solution to a severe problem. It achieves a long-overdue restructuring of an archaic bankruptcy system formulated "in the horse and buggy era of consumer and commercial credit," a system ill-suited to the demands of today's needs and institutions.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted,

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v.

MARATHON PIPELINE CO., ET AL.

UNITED STATES OF AMERICA, APPELLANT

v.

MARATHON PIPELINE CO., ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

REPLY BRIEF FOR THE UNITED STATES

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1. a. The gist of appellee's argument is the following (Br. 18-19): (1) when Congress creates an inferior court that exercises "the judicial power of the United States," it must confer on the judges of that court the tenure and salary guarantees of Article III, and (2) because the Bankruptcy Reform Act of 1978 gives bankruptcy courts jurisdiction over "case[s] arising under federal law," those courts exercise "the judicial power of the United States," and hence Congress' failure to invest them with tenure and salary guarantees violates Article III.[1] This simple analysis, however, which suggests that

[1] Appellee asserts (Br. 15-16) that Article III "serve[s] the concepts of both federalism and separation of powers." Whatever the merits of this statement, it is clear that appellee's argument

the exercise by the bankruptcy courts of both plenary jurisdiction and their traditional summary jurisdiction violates Article III, is belied by numerous decisions of this Court. Concededly, cases within the jurisdiction of the bankruptcy courts "arise under federal law" and thus fall within the class of cases to which the judicial power of the United States extends.[2] As explained in our opening brief (Br. 15-18), however, this Court has repeatedly held that a "legislative court"—one whose judges do not enjoy the tenure and salary guarantees of Article III—may exercise jurisdiction over cases to which the judicial power of the United States extends. In *American Insurance Co.* v. *Canter*, 26 U.S. (1 Pet.) 511 (1828), this

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here rests solely on the specific language of Article III; the Bankruptcy Reform Act plainly does not violate any constitutional principles of federalism or separation of powers.

The extension of bankruptcy court jurisdiction does not implicate any federalism considerations. Many of the plenary suits that fall within the jurisdiction of the bankruptcy courts will involve questions of federal law. State cases can be brought within their jurisdiction only if they are connected with the underlying bankruptcy, and those cases could have been brought into federal court even prior to the enactment of the Bankruptcy Reform Act. See, *e.g.*, *Schumacher* v. *Beeler*, 293 U.S. 367 (1934). By the same token, it is beyond doubt that the appointment of judges by the President to 14-year terms does not present any separation of powers problem. Indeed, the separation of the branches of government is even stronger in one sense in the case of bankruptcy courts—after 1984 bankruptcy judges will be subject to removal from office for incompetence, misconduct, or disability by the judicial council of the circuit (28 U.S.C. (Supp. III) 153), whereas Article III judges are subject to impeachment by Congress. *Cf. United States* v. *Raddatz*, 447 U.S. 667, 685 (1980) (Blackmun, J., concurring).

[2] Contrary to amicus curiae's unsupported assertion (Amicus Br. 11-14), the government has already made clear in its opening brief (Br. 18 & n.12) that it does not urge this Court to adopt the view espoused by Justice Jackson in *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582 (1949), namely, that bankruptcy jurisdiction does not arise under federal law within the meaning of Article III. (All references to "Amicus Br." are to the brief filed by Beneficial Corporation.)

Court held that a non-Article III territorial court could exercise admiralty jurisdiction, which explicitly falls within the "judicial power of the United States" as described in Article III. And the power of "legislative courts" to adjudicate cases arising under federal law consistently has been reaffirmed in the case of military courts, District of Columbia courts, and specialized courts, such as the Court of Claims.

b. Rather, the rule established by this Court is that, pursuant to its plenary legislative powers, Congress in certain circumstances may establish specialized courts that do not meet the tenure and salary requirements of Article III.[3] Such is the case here. Pursuant to its bankruptcy power under Article I, Section 8, Clause 4, Congress has the authority to pass laws dealing with the subject of bankruptcy. That power includes the authority to establish legislative bankruptcy courts if warranted by a particularized need.

Appellee raises two arguments against the validity of a legislative bankruptcy court. First, appellee contends (Br. 33-44) that legislative courts may be created only if they are substantially similar to those courts whose validity has already been upheld by this Court. In particular, appellee contends (Br. 33-38) that the Article III guarantees apply only to courts created within the states and thus that the existence of legislative courts in the territories and in the District of Columbia is essentially irrelevant to the question presented here. This distinction, however, does not withstand analysis. Ar-

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[3] Because most of Congress' legislative powers are contained in Article I, these courts are sometimes called "Article I courts." The same reasoning, of course, applies to plenary legislative powers of Congress found in other Articles of the Constitution. For example, Congress' power to establish territorial courts, which our opening brief mistakenly ascribed to Article I (Br. 17), derives from its authority in Article IV, Section 3, to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

ticle III contains no limitation suggesting that its provisions are inapplicable to federal courts created outside the states, and this Court has never suggested any such limitation. Moreover, several other courts created within the states—the military courts, the Customs Court, the Court of Claims and the Tax Court—have been held to be valid legislative courts.[4]

Indeed, any distinction between bankruptcy and other areas over which the Constitution confers lawmaking power on Congress cuts in favor of the constitutionality of the Bankruptcy Reform Act. This Court has long held that Congress may create courts to adjudicate cases arising under federal law that do not contain the tenure and salary guarantees of Article III, and that authority is not restricted to Congress' legislative power over federal enclaves. More than any other legislative power—and totally unlike most—the authority to "establish * * * uniform Laws on the subject of Bankruptcies" is an authority that by its very nature contemplates the resolution of private disputes. Given this fact, bankruptcy is the single legislative subject area over which Congress'

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[4] Appellee contends (Br. 38-43) that the validity of these courts is irrelevant here because their jurisdiction and powers are more limited than those of the bankruptcy courts. While there are differences, of course, between these courts and the bankruptcy courts, the notion that they are any less "courts" than the bankruptcy courts is fanciful. The Tax Court and the military courts have subpoena power and the power to punish contempt by imprisonment (see 26 U.S.C. 7456; 10 U.S.C. 847, 849), and their judgments are final unless set aside on appeal (see 26 U.S.C. 7481, 7485; 10 U.S.C. 857, 867, 871, 876). Plainly, these attributes of judicial power do not disqualify a court from being constituted as a legislative court; indeed, even administrative agencies exercise similar powers. See *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357, 363 (1965); *Lloyd Sabaudo Societa* v. *Elting*, 287 U.S. 329, 334-335 (1932). While the existing legislative courts may lack certain powers that have been identified as key attributes of "judicial power"—the power to enjoin other courts and a broad contempt power—those powers also have been withheld from the bankruptcy courts (see U.S. Br. 38-39).

determination that non-Article III courts are needed should be given greatest deference.[5]

Second, appellee suggests (Br. 20, 44-46) that Article III would be obliterated unless legislative courts are restricted to those contexts in which their validity has already been upheld by this Court. This is simply not so. Legislative courts may be created only pursuant to a specific legislative power.[6] Moreover, even pursuant to a specific grant of legislative authority, Congress' power to create such courts is not unfettered. As this Court explained in *Palmore* v. *United States*, 411 U.S. 389, 407-408 (1973), the requirements of Article III are generally the norm where affairs of national concern are at stake, but those requirements must give way *in proper circumstances* to accommodate Congress' plenary power to legislate with respect to specialized areas. This accommodation of Congress' legislative powers and the tenure and salary requirements of Article III balances competing constitutional interests and preserves an im-

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[5] Although appellee correctly states (Br. 15) that the salary and tenure provisions of Article III were intended to protect the independence of the judicial branch from the other branches of the federal government, it distinguishes legislative courts such as the Court of Military Appeals and the Tax Court from bankruptcy courts on the ground that the former "adjudicate matters arising between the Government and others" (Br. 38), rather than purely private disputes. Hence, according to appellee, Congress has more latitude to establish courts that do not enjoy Article III protections in precisely those situations (*i.e.*, where another branch of government is a party) where the protections would appear to be most essential. This Court has never suggested such an illogical rule. See, *e.g.*, *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 15 (1955).

[6] Appellee's failure to recognize this limitation is highlighted by its suggestion (Br. 33-34) that *American Insurance Co.* v. *Canter*, *supra*, refutes the view that Congress' power to establish legislative courts extends beyond the territories. *Canter* upheld the exercise of jurisdiction over admiralty cases in the territories because of Congress' power to legislate for the territories. There was no constitutional grant of legislative power that would have authorized Congress to create non-Article III courts to hear common law admiralty cases in the states. Here, of course, the bankruptcy courts are established pursuant to Congress' bankruptcy power.

portant role for the Article III protections. As Professor Wechsler stated in his letter to the House Judiciary Committee:

> [The *Palmore*] principle appears to me to place the proper values in the balance. The commitment of Article III, § 1 to permanent and tenured courts must be respected generally in creating jurisdiction to enforce laws of national applicability but the mandate may be relaxed by interpretation in light of "particularized needs" perceived by Congress in special areas of legislative competence to warrant such "distinctive treatment."

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 86 (1977).[7]

2. As explained in our opening brief (Br. 23-33), and contrary to appellee's contention (Br. 46-48), Congress correctly found that there existed a particularized need for a specialized bankruptcy court exercising plenary jurisdiction.[8] The basis for Congress' power to create a

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[7] Contrary to appellees' assertion (Br. 20, 28-31), neither the government's position nor the *Palmore* formulation suggests that the federal district courts could be constituted without the protections of Article III. Courts with general federal question jurisdiction are not confined to a specialized area of legislative competence. Indeed, the text of Article III supports the view that its protections are particularly applicable to courts vested with general federal question jurisdiction. The tenure and salary protections apply to courts in which the judicial power of the United States is "vested," and that power extends to "*all* Cases" enumerated in Article III. Thus, a court of limited jurisdiction has not been "vested" with "the judicial Power of the United States" in the sense that a court of general jurisdiction has.

[8] Amicus incorrectly states (Amicus Br. 7-8) that the Bankruptcy Reform Act strips the new bankruptcy courts of their administrative functions. While their administrative role has been reduced by the new Act, the new bankruptcy courts retain certain administrative functions. See, *e.g.*, 11 U.S.C. (Supp. IV) 327, 330, 350, 363, 364, 701, 1108. The quotation from the House Report reproduced by amicus (Amicus Br. 8) refers only to those few districts in which United States Trustees have been established as part of a pilot program. Even in those pilot districts, under the Act as

legislative court is particularly strong in the bankruptcy context. First, of course, the specialized nature of bankruptcy proceedings has long been recognized, and bankruptcy cases historically have been handled by special non-Article III judges or referees, albeit technically under the auspices of the district court. Moreover, unlike many of Congress' plenary powers, the power to establish laws on the subject of bankruptcies clearly contemplates the resolution of disputes between private parties, and it is only reasonable that the bankruptcy power include the power to establish a mechanism to resolve those disputes. And, as explained in detail in our opening brief (Br. 27-31), Congress found that it was essential to a workable bankruptcy system to vest these specialized bankruptcy courts with plenary jurisdiction.[9]

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passed, bankruptcy judges continue to perform the administrative functions that are not explicitly excluded by 11 U.S.C. (Supp. IV) 15103(f).

[9] Amicus contends (Amicus Br. 10) that the venue provisions of the Act do not advance the goal of centralization of bankruptcy proceedings, but that contention is based on a misreading of the statute. The statute generally provides that "a proceeding arising in or related to a case under title 11 may be commenced in the bankruptcy court in which such case is pending." 28 U.S.C. (Supp. III) 1473(a). There are two limited exceptions to this rule: (1) suits brought by the trustee for small sums—less than $1,000 or, in the case of consumer debt, less than $5,000; and (2) suits brought by the trustee based on a claim that arose after the commencement of the bankruptcy proceeding. 28 U.S.C. (Supp. III) 1473(b), (d). In addition, Sections 1473(c) and (e) grant a plaintiff the option, in certain limited circumstances, to bring suit in a district other than the district in which the bankruptcy proceeding is pending. Moreover, a bankruptcy court has the power to transfer a case to another district in the interest of justice and convenience. 28 U.S.C. (Supp. III) 1475.

Both amicus (Amicus Br. 9, 24) and appellee (Br. 7) mischaracterize the Act's removal provision, 28 U.S.C. (Supp. III) 1478. Only a party, not the bankruptcy court, has the power to remove a case. If a party does seek removal, the bankruptcy court is empowered to remand the case back to the district court for equitable reasons. It is only this decision whether or not to remand that the statute makes nonreviewable. See 28 U.S.C. (Supp. III)

Certainly appellee's argument (Br. 15-17) that the Framers intended that the requirements of Article III apply to suits that would otherwise be heard in state court has no application here. The bankruptcy power is one that is peculiar to the federal government. While the states may enact legislation concerning some aspects of insolvency if there is no federal law on the subject, other important aspects of bankruptcy legislation—for example, the discharge of a debtor's obligation—are completely beyond the power of the states because the states are forbidden to pass legislation that impairs the obligation of contract. See *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122, 196-208 (1819). Thus, the resolution of disputes under the federal bankruptcy laws is not a matter that would generally be committed to the state courts for decision.

3. Appellee contends (Br. 21-23) that *United States* v. *Raddatz*, 447 U.S. 667 (1980), establishes that the bankruptcy courts fail to satisfy Article III because they are not under the "total control" of an Article III court. This contention, which suggests that the 1973 Bankruptcy Rules adopted by this Court were similarly unconstitutional, is insubstantial. First, *Raddatz* upheld a provision of the Federal Magistrates Act, 28 U.S.C. 636(b)(1), against an Article III challenge, and, although the Court relied in its decision on the degree of control exercised by the district court, the Court carefully refrained from expressing any opinion on whether the final decision on a suppression motion could be made by a non-Article III magistrate. 447 U.S. at 681. In any event, *Raddatz* is inapposite here because it concerns the rights of criminal defendants—an area where the Court has shown a special solicitousness for the tenure and salary guarantees of Article III. See, *e.g.*, *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955). Indeed, even

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1478(b); H.R. Rep. No. 95-595, *supra*, at 51. In any case, as noted in our opening brief (Br. 28 n.21), the expanded jurisdiction of the bankruptcy courts can be expected to account for only a small portion of those courts' business, which primarily will be routine bankruptcy matters.

Justice Marshall's dissent in *Raddatz*, upon which amicus places great reliance (Amicus Br. 14, 17-18), goes no farther than contending that a criminal suppression hearing is "one of the admittedly few contexts in which independent factfinding by an Art. III judge is constitutionally required." 447 U.S. at 712. Thus, it is clear that *Raddatz* casts no doubt on the rule of *Crowell* v. *Benson*, 285 U.S. 22 (1932), that factfinding by a non-Article III officer in a civil case, subject to appeal to an Article III court, may satisfy the requirements of Article III (see U.S. Br. 40).[10]

4. Appellee asserts (Br. 24-28) that the Bankruptcy Reform Act made constitutionally significant changes from the prior practice, but in fact, as pointed out in our opening brief (Br. 41-45), no such changes were made. The only change of any significance in the relationship between the district court and the bankruptcy court was the elimination of the district court's infrequently exercised power to withdraw a reference from a

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[10] Appellee's contention (Br. 30) that Justice Harlan's plurality opinion in *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962), contradicts this rule is wrong on several counts. *Glidden* involved two separate cases—one in which a Court of Claims judge sat by designation on a court of appeals panel and one in which a judge of the Court of Customs and Patent Appeals presided over a criminal trial. Justice Harlan explained why it was necessary for the Court to reach the question whether these judges were Article III judges, and those reasons do not cast any shadow on the holding of *Crowell*. In the first case, it was clear that the court of appeals panel would have been defective if the judge sitting by designation were not an Article III judge. Because the case was within the diversity jurisdiction of the federal court, there was no conceivable basis for the exercise of jurisdiction by a legislative court. 370 U.S. at 537. See U.S. Br. 22. Moreover, there was no right of appeal from the court of appeals' decision. With respect to the second case, which is in any event distinguishable because it was a criminal case, Justice Harlan carefully stated that he expressed no view as to the correctness of the decision below that the trial could constitutionally have been conducted by a non-Article III judge. 370 U.S. at 538. See *Palmore* v. *United States*, *supra*, 411 U.S. at 405-406 n.13.

bankruptcy judge pursuant to Bankruptcy Rule 102(b). See generally Advisory Committee Note to Bankruptcy Rule 901(7). It had long been established under the old Act that the order of a bankruptcy referee, who was included by the statute within the definition of the bankruptcy court (11 U.S.C. 1(9)), was final, unless an appeal was taken within 10 days. See 11 U.S.C. 67(c); S. Rep. No. 1689, 80th Cong., 2d Sess. (1960). And those orders in adversary proceedings were enforceable pursuant to Fed. R. Civ. P. 69. See Bankruptcy Rule 769. While appellee correctly states (Br. 23) that filing of papers, discovery, and other matters are now under the bankruptcy court's control, this represents no change from the practice prior to the enactment of the Bankruptcy Reform Act. See Bankruptcy Rules 509(a), 701 *et seq.* With respect to plenary jurisdiction, appellee recognizes (Br. 27-28) that *MacDonald* v. *Plymouth Trust Co.*, 286 U.S. 263 (1932), found no constitutional bar to the decision by a non-tenured referee of cases transferred with the consent of the parties (see U.S. Br. 44-45).

In sum, the thrust of appellee's contention is not only that the vesting of plenary jurisdiction in the bankruptcy courts is unconstitutional, but also that the exercise of traditional summary jurisdiction over bankruptcy matters by those courts, or by referees as they operated under the Bankruptcy Rules adopted by this Court in 1973, is unconstitutional. Under appellee's interpretation of Article III, Congress apparently must either confer primary responsibility for bankruptcy matters upon the district courts—a course of action that Congress has already said would be unworkable (see U.S. Br. 24-25)—or confer the Article III salary and tenure guarantees upon the bankruptcy judges, which would swell the ranks of the tenured judiciary enormously. Article III does not compel such a choice. The Bankruptcy Reform Act is constitutional both because the particularized need for a special bankruptcy court warrants the establishment of a legisla-

tive court and because that court has been established as an adjunct with limited powers subject to appeal as of right to an Article III court.[11]

For the foregoing reasons and the reasons set forth in the government's opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

APRIL 1982

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[11] Appellee's repeated reference (Br. 3-4, 31, 33, 45) to a letter from the Department of Justice to Congress concerning the provisions of the original House bill is puzzling. This letter and accompanying memorandum, which is not mentioned in any of the congressional reports, does not suggest that the Bankruptcy Reform Act is unconstitutional. The memorandum expresses doubt whether all of the powers conferred on the bankruptcy courts by the bill can constitutionally be conferred upon a legislative court, although it states that those powers can be conferred upon bankruptcy judges who are adjuncts to the district court. The House bill was later amended to delete those powers of the bankruptcy court that had caused the most constitutional concern (see U.S. Br. 38), and the bankruptcy courts were changed to be adjuncts to the district court. Attorney General Bell testified on behalf of the Justice Department that the Senate bill incorporating these changes was constitutional. *Hearings on S. 2266 and H.R. 8200 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 544 (1977).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

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Appellant

v.

MARATHON PIPELINE CO.
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Appellees

UNITED STATES,
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and NORTHERN PIPELINE CONSTRUCTION CO.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

BRIEF FOR AMICUS CURIAE BENEFICIAL CORPORATION IN SUPPORT OF APPELLEE

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BRIEF FOR AMICUS CURIAE BENEFICIAL CORPORATION IN SUPPORT OF APPELLEE

INTEREST OF AMICUS CURIAE

Beneficial Corporation, through one of its subsidiaries, Beneficial Finance of Kansas, Inc., has a cross-appeal pending in this Court raising an issue closely related to that presented here. No. 81-184. Resolution of the issue here may resolve the question raised in No. 81-184.

SUMMARY OF ARGUMENT

The issue before this Court—the authority of Congress to take judicial power of the United States from courts of the United States, constituted as such in conformity with Article III of the Constitution, and to vest that judicial power in persons and tribunals which are *not* courts or judges of the United States under the Constitution—is of profound importance to the constitutional structure of our national government. Our Constitution is based upon the principles of a secure, independent

federal judicial system, and upon the separation of powers between the judiciary, on the one hand, and the executive and legislative authorities, on the other.

We recognize the difficulty of the problem in general. Such difficulties, however, both require resort to and are clarified by first principles. Such resort shows that the creation of a system of courts, outside of Article III, to exercise powers of the scope and nature of the adjudicatory system in the Bankruptcy Reform Act of 1978, clearly violates our Constitution; it is a fundamental, and alarming, departure from the principle that within the states the essential judicial power of the United States may be vested only in courts and judges that have the independence from the legislative and executive, and from the winds of politics and public and private pressures, that is assured by Article III of the Constitution.

As we shall show, the fact that this is "bankruptcy" legislation does not salvage or excuse the provisions of the Act. We know of no way—no process of logic, no ingenious carving of principle—by which a decision sustaining the constitutionality of the so-called Bankruptcy Judge's exercise of jurisdiction in the present case, can be confined to the "bankruptcy" context. The government's brief so acknowledges (Brief of the United States ("Br. U. S.") at 22-23). To be sure, the "bankruptcy" power is vested in the federal government pursuant to Article I, Section 8 of the Constitution; but so are most of the powers of Congress upon which the judiciary acts. Practical reasons, such as the government advances here, can be advanced for transferring the exercise of judicial power from the federal district courts to politically vulnerable "legislative" courts in every other area: patents, antitrust cases, admiralty, securities litigation, etc.; and often, as in the present case, we must anticipate that the transfer will be so extensive as to far exceed the proclaimed need.

The Brief of the United States sweepingly asserts, as it must to sustain its position in the present case, that "Congress

may establish such [Article I] courts in furtherance of a specific Article I power when there is a particularized need for a specialized court" (*Id.* at 22). Any qualification thought to inhere in such a formulation is of cold comfort for, as the government urges, the decision of the Congress as to the existence of a "particularized need" is entitled to substantial weight. (*Id.* at 39 n. 26). The only area of federal court jurisdiction that the government suggests might be immune from transfer to the authority of the legislative branch is "diversity jurisdiction" (*Id.* 22.). The government's submission, therefore, is that this Court should validate a license to the Congress to withdraw jurisdiction from the federal district courts over whatever "specialized" areas it sees fit, and to vest such jurisdiction in politically vulnerable, non-constitutional judges. The use of such authority—if it is given to the Congress—may, from time to time, be irresistible: it would result in multiplying the frequency of Presidential appointments and Senatorial patronage; it could be an easy response to public complaints about unpopular federal court decisions.

This is a case of first impression. Never before has Congress attempted such a bold incursion into Article III's traditional realm. As we shall discuss, the cases relied on by the government—courts in the territorities, or in the District of Columbia, or which involve controversies with the United States in its sovereign capacity and within the exclusive discretion of Congress or the Executive—did not involve legislation challenging the central function and purpose of Article III, and cannot be used as an excuse to vitiate the protections of that Article.

ARGUMENT

The Act Unconstitutionally Constitutes Courts and Judges in Whom Is Vested the Judicial Power of the United States, Without Compliance With Article III of the Constitution.

The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 *et seq.* (the "Act") established "United States

Bankruptcy Courts" which, with insignificant exceptions, possess all the powers of the federal district courts and, indeed, certain powers they do not possess. The judges created for these new Bankruptcy Courts now exclusively hear and determine all bankruptcy and related matters which throughout our history have been heard exclusively by or under the control and supervision of the federal district courts. *See, e.g.* 28 U. S. C. § 1471(e). However, unlike federal district judges and contrary to Article III's express command, the tenure of the new bankruptcy judges is expressly limited to a term of years, and their compensation is subject to diminution. Congress and the President control reappointment and salary. 28 U. S. C. §§ 152-154.[1]

Congress may not pass bankruptcy laws which conflict with the specific commands about the exercise of judicial power found in Article III of the Constitution. As with many of its powers, Congress derives its power to pass "uniform laws on the subject of bankruptcies" from Article I, Section 8.[2]

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[1] Under the Act bankruptcy judges appointed in 1984 will serve 14 year terms. Bankruptcy Act, Public Law No. 95-598, Title IV, 28 U.S.C. §§ 152, 153. During the transition, the existing referees are empowered to act and their terms are extended through March 31, 1984. Title IV, § 404(a)(b), 92 Stat. 2683. Each was appointed by a district judge for a six year term. 11 U.S.C. §§ 61, 62 (1976). Compensation is keyed to the Federal Salary Act, which allows for diminution. 28 U.S.C. §§ 153, 154.

[2] Article I Section 8 provides, *inter alia:*

> "Congress shall have Power . . . to regulate commerce . . . among the several states . . [and] to establish a uniform Rule of Naturalization, a uniform laws on the subject of Bankruptcies throughout the United States."

The power to prescribe uniform laws on the subject of bankruptcy, however, is not unlimited. It does not allow Congress to dispense with specific Constitutional limitations on the exercise of government power, such as due process of law or the requirement of just compensation for the taking of private property for a public use. *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 55 S. Ct. 854 (1935). No more does the power allow Congress to dispense with the provisions of Article III designed to protect the independence of the federal judiciary. To say otherwise would create an absurdity—that what Article III denies to Congress, Congress can circumvent through Article I.[3]

I. THE BANKRUPTCY REFORM ACT VESTS THE "JUDICIAL POWER OF THE UNITED STATES" IN AN "INFERIOR COURT" LACKING THE TENURE AND SALARY PROTECTIONS ARTICLE III REQUIRES.

The question whether Congress can properly establish the new bankruptcy courts, which do not conform to Article III,[4] turns on two issues: (1) whether these bankruptcy courts are

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[3] *See* Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts Are Unconstitutional*, 70 Geo. L. J. 297, 305 (1981) ("Congressional action under article I is always subject to limits imposed by other provisions of the Constitution.").

[4] Article III of the Constitution provides:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . .

"inferior courts", and (2) whether they have been vested with "the judicial Power of the United States" as defined in Article III, Section 2. The answer to both questions is unquestionably in the affirmative. Indeed, the government and appellant do not appear to seriously challenge those conclusions, as they could hardly do.

a. The Act Creates Courts and Judges Possessing a Full Panoply of Judicial Powers

Without doubt, in the Bankruptcy Reform Act of 1978 Congress created and intended to create courts and judges without constitutional protections but with full Judicial authority and powers indistinguishable from those of Article III judges and courts.[5] The *only* limitations on the powers of the bankruptcy judges are that (a) they may not enjoin other courts; and (b) they may not punish a criminal contempt not committed in the presence of the judge or warranting imprisonment (although their civil contempt powers are unlimited by the Act).[6]

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[5] Any distinctions between the new bankruptcy judges and constitutional judges are expressly obliterated. The new bankruptcy courts are "courts of the United States" and the new bankruptcy judges are "judges of the United States." 28 U.S.C. § 451. Provisions of the United States Code empowering courts and judges of the United States, including the All-Writs provision, accordingly apply. 28 U.S.C. § 1651. The new bankruptcy judges are members of the Judicial Conference of each circuit, with two to participate in the Judicial Conference of the United States, 28 U.S.C. §§ 331, 333. A retired bankruptcy judge may be assigned to perform "such judicial duties within the circuit" as he is willing and able to undertake, 28 U.S.C. § 294(c), including duty on "a court of appeals or district court." 28 U.S.C. § 294(d). *Cf. also* 28 U.S.C. § 295.

[6] Even these minor limitations appear to have already been subsequently breached or dispensed with. The Securities Investor Protection Act, 15 U.S.C. § 78aaa *et seq.*, requires removal of all actions filed under that Act to the local bankruptcy court, which then, without qualification, is vested with "all of the jurisdiction, powers, and duties conferred" under that Act upon the district court. 15 U.S.C. § 78eee(4).

Contrary to the government's suggestions, these courts are not administrative agencies or "analogous" to them.[7]

b. The Bankruptcy Courts Are Not "Administrative".

In view of the government's attempted analogy of the bankruptcy courts to an administrative agency (Br. U. S. at 33-37), it is a striking fact that the Reform Act strips the bankruptcy judge of the "administrative" functions of the prior referees and reposes those functions in the trustee *See, e.g.*, 11 U. S. C. §§ 323, 327, 343, 363, 364. This was a prime goal of the Act. Report of the House Subcommittee on Civil and Constitutional Rights for the Committee of the Judiciary, H.R. Rep. N.95-595, 95th Cong. 1st Sess., *reprinted in* [1978] *U.S. CONG. & ADMIN. NEWS* 5968 ("House Report") at 3-4. The bankruptcy judges are precluded from participating in various "administrative" functions for the purpose of avoiding activities that might be inconsistent with their judicial role. For example, the bankruptcy judges may no longer attend creditors' meetings or meetings of equity securities holders (11 U. S. C. § 341(c));

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[7] A short recital demonstrates the essential judicial nature of the new bankruptcy courts and also how completely they have been vested with the powers of the district courts. Thus, under the Act:

a. The bankruptcy court "shall have the powers of a court of equity, law, and admiralty," with the minor reservations noted above. (28 U.S.C. § 1481.) Its judgments are final subject only to appellate review.

b. The bankruptcy court has ample power to enforce its judgments; it may award damages, order specific performance, levy execution, issue injunctions, grant declaratory judgments (28 U.S.C. § 2201), and impose civil contempt judgments.

c. The bankruptcy judge is given the right to hold jury trials. (28 U.S.C. § 1480.)

d. A bankruptcy court may issue a writ of *habeas corpus* to bring a person before the court "to perform a duty imposed on such person under this title," or for examination, or to testify, or to order release of a debtor imprisoned under judgment "of a Federal or State court" if he was imprisoned on process in a civil action. (28 U.S.C. § 2256.)

absent objection, notice and contest, they may no longer scrutinize claims, or participate in formulating plans or supervising or controlling sales of property of the estate or the incurring of obligations by the trustee or debtor-in-possession. (11 U. S. C. §§ 502, 363, 364). As the House Report pointed out:

> These changes in the present bankruptcy administration system will accomplish the separation of judicial and administrative functions currently performed by the bankruptcy judges. The judges will become passive arbiters of disputes that arise in bankruptcy cases. The United States trustees will assume the bankruptcy judges' current supervisory roles over the conduct of bankruptcy cases and over individuals serving in the bankruptcy system. *Id.*, at 107.

In short, the bankruptcy judges are to function as judges, and solely as judges, indistinguishable from Article III judges.

c. The Bankruptcy Courts Are Not "Specialized".

The word "specialized" with respect to the new bankruptcy courts appears on virtually every page of the Government's Brief. (Br. U.S. at 9, 10, 13, 14, 15, 20, 21, 22, 23, 25, 26, 27, 31, 33.) The truth is the opposite. The range of matters encompassed within the sweep of the jurisdiction of the new bankruptcy courts shows they fully displace the district courts across a wide expanse of the normal jurisdiction of the district courts.

The Act confers upon the bankruptcy courts jurisdiction "of all civil proceedings arising under title 11 or *arising in or related to* cases under title 11." The meaning and scope of this provision is made clear in 28 U. S. C. §§ 1471, 1473, 1474, and 1478. The Act gives the bankruptcy courts jurisdiction over what would otherwise be state, as well as federal, actions. Suits between third parties › which the debtor or trustee is *not* a party may be included if they are "related to" the case in bankruptcy (for example, if the debtor may be liable as guarantor or for indemnity or contribution; or if the debtor is a member of the plaintiff or defendant class).

The suits may have been pending before an Article III judge for a long time. Discovery may have taken place, as in the present case. No findings or any showing are required to justify the bankruptcy court taking jurisdiction over "related" cases, or removing cases to itself. Its decision to take jurisdiction, to abstain or not to abstain, or to remand or refuse to remand a case is final—"is not reviewable by appeal or otherwise." (28 U. S. C. §§ 1471, 1478).

The vast scope of the cases which will thus be swept into these non-constitutional "courts" encompasses the entire *corpus juris*, state and federal: antitrust, securities, commodities, tax (except tax cases in the United States Tax Court), contracts, torts, divorce, alimony, mechanic's liens, personal injury, employee discrimination, etc. 28 U. S. C. §§ 1473, 1478 & 1474[8] Indeed, the Act goes so far as to provide that the jurisdiction of the bankruptcy courts shall attach "*Notwithstanding any Act of Congress* that confers jurisdiction on a court or courts other than the district courts." (28 U. S. C. § 1471(b)).[9]

In view of this fantastic sweep, far exceeding any possible specialization of bankruptcy courts and judges, skepticism is indeed in order as to the alleged justification or "particularized need" for this bold supersession of the judiciary and the subversion of Article III and our constitutionally ordained

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[8] As the House Report admitted:

> The bankruptcy court's general jurisdiction and broad judicial powers make it a true court, unlike specialized administrative tribunals. To the extent that it is a specialized forum, its specialization is unlike that of the Tax Court, where primarily issues under the Internal Revenue Code are decided; or of the Customs Court, or Court of Customs and Patent Appeals, where the range of issues is similarly limited. *House Report*, at 32.

[9] And the concept of "bankruptcy" itself has expanded far beyond its original limitation to involuntary proceedings against "traders". As Professor Charles Warren has stated, "The expansive possibility of [the Bankruptcy Clause of the Constitution] has been one of the most interesting features in the application of our Federal Constitution". Warren, *Bankruptcy in United States History*, (1935), Foreword.

judicial system. Although in any event not justifying disregard of Article III, we doubt that the bankruptcy judges have or will have more special expertise with these matters than the state and federal judges; indeed, no qualifications, not even legal training, are stated for these bankruptcy judges.

d. The Bankruptcy Courts Do Not "Centralize" Bankruptcy Matters.

The government argues that considerations of efficiency in the centralization of all matters related to a bankruptcy in one court justify the Act. Centralization would not require ignoring Article III. But the argument is belied by the facts anyhow. The Act requires that a broad range of cases, including as a practical matter the most extensive types, *must* be commenced in the bankruptcy court for the district where venue would have been proper under applicable nonbankruptcy provisions, 28 U. S. C. § 1473(b)-(e). And removal of a pending "related" civil action is "to the bankruptcy court *for the district where such civil action is pending.*" 28 U. S. C. § 1478(a). Thus, contrary to the government's suggestion (Br. U. S. at 27-31), considerations of efficiency in the centralization of bankruptcy and related cases is *not* a justification for the new bankruptcy court system. Trustees in bankruptcy will still have to travel to remote forums. The net effect of the Act, plainly stated, is to constitute the non-Article III bankruptcy courts and judges as a separate, comprehensive judicial system at the trial level and even, where separate appellate tribunals of bankruptcy "judges" are created, 28 U. S. C. §§ 160, 1482, at the appellate level. The fact that the new Act does *not* centralize litigation in one bankruptcy court starkly reveals that its true purpose is *not* to facilitate disposition of all claims affecting the bankrupt in a single forum, but to create a system of courts circumventing, paralleling, and displacing the federal district court system.

e. This Case "Arises Under" Federal Law And Is Within The Judicial Power Defined In Article III.

Clear as it is that a fully empowered "inferior court" exercising "judicial Power" has been created here, it is also clear that the matters assigned to it "arise under" federal law.[10] The adversary complaint that is the subject of this proceeding is based on the Reform Act and seeks an adjudication of the rights of the debtor under the provisions of that Act. The case, therefore "arises under" the laws of the United States. *Gully* v. *First National Bank in Meridian*, 299 U. S. 109, 57 S. Ct. 96 (1936); *American Well Works Co.* v. *Layne S. Bowler Co.*, 241 U. S. 257, 260, 36 S. Ct. 585 (1916); *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 381, 79 S. Ct. 468 (1959) (Brennan, J., concurring in part, dissenting in part).

Although Congress derives from Article I its power to pass uniform laws on bankruptcies, like its power to pass laws involving interstate commerce, its power to make such a law the basis for jurisdiction in an "inferior court" of the United States derives solely from Article III. A contrary view, advanced by Justice Jackson, speaking for himself and two others, in *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582, 69 S. Ct. 1173 (1949), was categorically repudiated by six members of the Court. As Justice Rutledge, concurring in the judgment, wrote:

> Nor is there merit in the view that the bankruptcy jurisdiction of district courts does not stem from Article III. Of course, it is true that Article I is the source of congressional power over interstate commerce, taxation, the coining of money, and other powers confided by the states to the exclusive exercise of the national legislature. But, as Mr. Justice Frankfurther's opinion [dissenting from the judg-

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[10] Article III, Section 2 of the Constitution provides that the "judicial Power shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States . . . . "

> ment] makes clear, Federal court adjudication of disputes arising pursuant to bankruptcy and other legislation is conventional Federal-question jurisdiction and no case cited in today's opinions remotely suggests the contrary. 337 U. S. at 611.[11]

Justice Jackson's suggestion, urged here again by the government, that bankruptcy jurisdiction arises under Article I, is also refuted by the long history, going back 180 years, of vesting bankruptcy jurisdiction in Article III courts. This is especially pertinent because for an equally long period it has been recognized that matters arising outside the confines of Article III judicial power may not be assigned to an Article III court. *Hayburn's Case,* 2 Dall. 409 (1792), *Hodgsan* v. *Bowerbank,* 9 U. S. (5 Cranch) 303 (1809); *Gordon* v. *United States,* 117 U. S. 697 (1869). Thus, the fact that since the time of the Constitution Article III courts have been exercising the bankruptcy power is utterly inconsistent with the assertion that the power to adjudicate bankruptcy matters can be outside Article III. Over a hundred and fifty years after *Hayburn's case,* six of the nine justices in *Tidewater, supra,* firmly agreed with this proposition.

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[11] Justice Frankfurter joined by Justice Reed, dissenting as to the judgment but whose views on this point were approved by Chief Justice Vinson and Justice Douglas, concluded that bankruptcy jurisdiction, summary and plenary, clearly "arose under" federal law:

> That a particular claim disassociated from the fact of bankruptcy would have to be brought in a state court for want of any ground of Federal jurisdiction is irrelevant. This is so because in the exercise of its powers to "pass uniform laws on the subject of bankruptcies" Congress may deem it desirable that the Federal courts be utilized for all the claims that pertain to the bankrupt estate whether in the Federal court in which the bankruptcy proceedings is pending or in a more convenient Federal court. The congeries of controversies thus brought into being by reason of bankruptcy may be lodged in Federal court because they arise under 'the laws of the United States', to wit, laws concerning the 'subject of bankruptcies'." 337 U.S. at 652 n. 3.

Nor does the court's power to hear so-called "plenary" suits in bankruptcy stand on a different footing. Although many matters denominated "plenary" under the 1898 Act, such as the claim of Northern Pipeline in the present case, involve issues of state law, they fall within the federal-question provision both because the trustee's authority is a federal ingredient in each instance (*cf. Osborn* v. *Bank of the United States,* 22 U. S. (9 Wheat.) 738 (1824)) and, as Justice Frankfurter said in the excerpt from *Tidewater* quoted above, because they are ancillary to the federal issue of whether to grant a discharge (*cf. United Mine Workers* v. *Gibbs,* 383 U. S. 715, 86 S. Ct. 1130 (1966)). If plenary matters were not within Article III, the District Court could not have been authorized to hear them at all.[12]

Thus, the *Tidewater* decision leaves no doubt that both summary and plenary bankruptcy proceedings "arise under" Article III.[13]

Incontestably, therefore, the new bankruptcy courts fill all the requirements for Article III courts. They are inferior courts armed with full judicial powers across a broad range of subject matters normally a part of the business of the federal district courts. They exercise the judicial Power of the United States

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[12] The government misconstrues the relevance of consent to plenary jurisdiction under the old Act and *Schumacher v. Beeler,* 293 U.S. 367, 55 S. Ct. 230 (1934). (Br. U.S. at 32, 44-45). In those plenary cases, subject matter jurisdiction under Article III already existed in the federal courts by virtue of the doctrine of *Osborn v. Bank of the United States,* 22 U.S. (9 Wheat.) 738 (1824). Congress, however, chose to limit the exercise of plenary jurisdiction to cases where the defendant consented. See also *Williams v. Austrian,* 331 U.S. 642, 67 S. Ct. 1443 (1947).

[13] The fact that the Act "confers" jurisdiction upon the District Courts and immediately transfers it to the bankruptcy courts emphasizes that it is "the judicial Power of the United States" under Article III which is vested in these courts, and not some other kind of power.

with respect to matters "arising under" federal law, i.e. the bankruptcy laws. The Constitution therefore requires that the judges of these courts hold their offices with the tenure and salary set out in Article III, Section 1.[14]

II. NO DECISION OF THIS COURT HAS EVER UPHELD THE VESTING OF ARTICLE III POWER IN A COURT LACKING ARTICLE III'S TENURE AND SALARY PROTECTIONS

A. The Government's Argument Would Destroy Article III.

As two Justices of this Court have recently stated:

> Congress has never attempted to displace Art III courts when laws of nationwide applicability were involved, and nothing in our prior decisions suggest that it may constitutionally do so. *United States* v. *Raddatz*, 447 U.S. 667, 706, 100 S.Ct. 2406 (1980) (dissenting opinion of Marshall, J., joined by Brennan, J.)

The Bankruptcy Reform Act of 1978 would accomplish precisely this forbidden end.

The government argues to sustain this extraordinary enactment that the judiciary article, Article III, is mandatory, if at all, only as to diversity cases (Br. U.S. 22), and that Congress in the exercise of its Article I powers may create courts free of Article III's requirements whenever it feels a need to do so.

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[14] We disregard the obvious sham of conferring the jurisdiction upon the district courts and then providing that the bankruptcy courts "shall exercise all of the jurisdiction conferred by this section on the district courts" (28 U.S.C. § 1471(a) and (b)), and the transparent sham of referring to the bankruptcy courts as "adjuncts" of the district court (28 U.S.C. § 151(a)). *See 2 Collier on Bankruptcy* ¶ 2.01[c] at 29 (1980) ("It is quite doubtful that this bit of legerdemain will overcome any extant Constitutional prohibitions.") The district courts have no supervisory authority or power over the bankruptcy court's personnel, or any other power which would lend minimal plausibility to these devices.

Article I, Section 8, similar to other parts of the Constitution (see *e.g.* Article IV, Sections 1, 3 and 4; Amendments 13-16, 19, 23-24, 26), enumerates numerous powers of Congress to enact laws, including, for example, the specific grant of power to regulate commerce.[15] Why the government's formulation is limited to "Article I" powers is not apparent. Nevertheless, by the government's reasoning, Congress could provide for the adjudication, for example, of all cases arising under laws enacted by it under the commerce clause, by judges and courts not qualified under Article III.

The government does not attempt to limit the sweep of the principle which it asserts. It only states, without attempt to rationalize it, that "the power to create specialized Article I courts does not mean that Congress can replace the independent Article III inferior federal judiciary by a *wholesale* assignment of federal judicial business to legislative courts" (Br. U.S. 22-23) (emphasis added). The suggestion is that piecemeal replacement is authorized.

We respectfully submit that this is a startling and an insupportable premise; that although the reach of the judicial article (Article III) is not co-extensive with all federal powers, where it was intended to function, *all* of the powers of Congress specified in Article I and elsewhere are subject to it. The contrary proposition would be subversive of the basic principles of our system: namely, the assurance to the states that within their realm the federal government shall have an independent, protected judiciary.[16]

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[15] Neither the bankruptcy nor the commerce powers are exclusive. States may legislate in these areas to the extent not inconsistent with a federal enactment. *Sturgis v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).

[16] The lack of any constitutional basis for the bankruptcy courts was recognized by the only Congressional Committee to study the constitutional issue in depth:

> In sum, the Constitution suggests that an independent bankruptcy court must be created under Article III. Article III [illegible] the

(Footnote continued on following page.)

B. The Precedents Relied on By the Government Do Not Infringe Article III and Cannot Support the Bankruptcy Act's Emasculation of Article III.

The arguments advanced in support of the bankruptcy courts rely on supposed analogy to other instances in which nontenured courts are permitted or have been permitted to adjudicate matters that could, but need not be, vested in Article III courts.

The sharp contrast between those instances and what has been attempted in the bankruptcy courts is apparent when the historic purposes of Article III are considered. Those purposes were twofold: (1) to limit federal power as against the sovereignty of the states and (2) to separate from each other the exercise of federal powers that were distinctively judicial, executive, and legislative, respectively.

As to the first objective, (1) the jurisdiction of the Federal courts in the United States was limited to the types of controversies specifically enumerated, leaving the rest to the states; and (2) Congress was not required to exercise this jurisdiction nor to establish inferior federal courts, but could leave such matters to the state courts to adjudicate. The delegates in Philadelphia were not concerned that federal judicial power be exercised at all by inferior Federal courts, but they were very concerned that, if it were, it should only be exercised so as to protect state sovereignty from the misuse of judicial power at the federal level.

Thus the structure of the Constitution reflects the Framers' twin paramount concerns; that *within the states* the "judicial Power of the United States," as with the executive and legislative powers, be limited and defined, and that the essential

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(Footnote continued from preceding page.)

constitutional norm, and the limited circumstances in which the courts have permitted departure from the requirements of Article III are not present in the bankruptcy context. Even if they were present, the text of the Constitution and the case law indicate that a court created without regard to Article III most likely could not exercise the power needed by a bankruptcy court to carry out its proper functions.

House Report at 39.

"judicial Power of the United States" not overreach and infringe upon the executive and legislative, nor they with the other. Article III was not concerned with the exercise of federal power *outside* the states, nor with the exercise of power not inherently and imperatively *judicial.* Given this predicate, the prior decisions of this Court are wholly consistent with Article III.

As to the second objective, the plain intent of Article III was to insure that "cases and controversies"—i.e. traditional judicial business—if adjudicated in federal tribunals, would be in courts absolutely protected against executive and legislative influence.

1. The Existence of Non-Tenured State Courts Is Irrelevant.

The government appears to argue that because Congress may leave to state courts the adjudication of matters within Article III, it follows that Congress may vest Article III jurisdiction in non-Article III courts. (Br. U. S. 15.) The argument is a non-sequitur and if accepted would totally subvert the purposes of Article III.

The identical argument was advanced by the government in *United States* v. *Raddatz,* 447 U. S. 667, 100 S. Ct. 2406 (1980), and was not the basis for this Court's decision in that case. The argument was fully answered in the opinion of two members of the Court:

> [T]he argument misconceives the intentions that underlay the constitutional compromise embodied in Article III. The Framers were especially concerned about the possibility of an alliance between federal judges and the Congress. For this reason, they ensured that federal judges would be isolated from the legislative branch of the Federal Government and protected from congressional reprisal. State courts were perceived as necessarily independent from the Federal Government and as a relatively reliable buffer against its excesses. No such assurance would be possible with respect to federal judges unprotected by the provisions of Article III. It follows from those assumptions that under Article III, Congress is generally prohibited from creating specially accountable federal

tribunals but at the same time is permitted to entrust issues of federal law to state tribunals.

United States v. *Raddatz*, 447 U. S. 667, 705 n. 6, 100 S. Ct. 2406 (1980) (Justices Marshall and Brennan, dissenting). As Justices Marshall and Brennan stated, such a view "would render the requirements of Article III practically meaningless." *Ibid.*

2. The Attempted Analogy to "Legislative Courts" Cannot Support the Vesting of Judicial Power in the Bankruptcy Courts.

a. Territorial Courts and the District of Columbia.

The establishment of non-Article III courts in the territories of the United States does not involve the vesting of the judicial power defined by Article III, or the exercise of the power of Congress to create inferior tribunals pursuant to that Article. As explained long ago by Chief Justice Marshall in *American Insurance Co.* v. *356 Bales of Cotton (Canter)*, 26 U. S. (1 Pet.) 511 (1828), those courts have been created by virtue of Congress' pervasive power over the territories, flowing from the total sovereignty that is both inherent in the federal government and expressly conferred on Congress by Article IV, § 3. These powers are not limited by the separation of powers, but only by the fundamental individual rights found in the Bill of Rights. *See, e.g., Balzac* v. *Porto Rico*, 258 U. S. 298, 42 S. Ct. 393 (1922); *Downes* v. *Bidwell*, 182 U. S. 244, 21 S. Ct. 770 (1901); *Dorr* v. *United States*, 195 U. S. 138, 24 S. Ct. 808 (1904). Subject to such rights, Congress could provide for the adjudication of such cases by the Governor or an executive council. As Chief Justice Marshall stated in *Canter:* "In legislating for [the territories], Congress exercises the combined powers of the general, and of a state government." 26 U. S. (1 Pet.) at 546. *See also United States* v. *Coe*, 155 U. S. 76, 15 S. Ct. 16 (1894) (territory of Arizona); *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 19 S. Ct. 722 (1899) (Indian Territory); *In re Ross*, 140 U. S. 453, 11 S. Ct. 897 (1891) (consular court in China).

The same principle supports the creation of non-Article III courts in the District of Columbia. *United States* v. *Palmore*,

411 U. S. 389, 93 S. Ct. 1670 (1973). Relying upon the territorial-courts precedents. this Court held in *Palmore* that the local courts established by Congress in the District of Columbia were created "pursuant to the plenary Art I power to legislate for the District of Columbia . . . and to exercise the 'powers of . . . a State government in all cases where legislation is possible." 411 U. S. at 407. The Court was careful to distinguish the previous District of Columbia courts involved in *O'Donoghue* v. *United States,* 289 U. S. 516 (1933), which held such courts to be entitled to Article III protection, on the ground that those courts had authority "over all those controversies, civil and criminal, arising under the Constitution and the statutes of the United States and having nationwide application." 411 U. S. at 405-06. Whether Congress could vest the latter power in a non-Article III court in the District of Columbia was not passed on in *Palmore,* for Congress had made no such attempt; it had preserved Article III courts in the District "for consideration of those constitutional and statutory matters of general concern that so moved the Court in *O'Donoghue.*" 411 U. S. at 407.

Just as the issue presented in *Palmore* was "a far cry from *O'Donoghue*" (411 U. S. at 406), so this case is a far cry from anything decided in *Palmore* or the earlier territorial-court cases.

The government ignores the distinction, carefully articulated in the *Palmore* opinion, between local matters and laws of nationwide applicability. It relies (Br. U. S. at 21, *et passim*) on a *partial* quote from this Court's opinion that the protections prescribed in Article III "must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment".[17] The omitted

[17] The whole quote is that:

> requirements of Art III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment. 411 U.S. at 408.

As shown previously, the bankruptcy courts are not even limited to any "specialized" area nor do they centralize bankruptcy cases, so even the partial quote is not satisfied.

portion of the quote makes clear that this Court did not intend to provide Congress with a wide-open license to emasculate the judicial article of our Constitution. On the contrary, the Court, in the same sentence, makes clear that the requirements of Article III are inescapably "applicable where laws of national applicability and affairs of national concern are at stake". (411 U. S. at 408).

The bankruptcy laws are obviously such laws; they are nationwide and not confined to a geographical area; they are "uniform", as the Constitution requires, "throughout the United States" (Section 8, Clause 4); and they are of national concern. Nothing in *Palmore* authorizes the Bankruptcy Reform Act's destruction of Article III within the states.

b. Matters Committed to Other Branches: the Court of Claims and Customs Court.

The government erroneously seeks justification for the bankruptcy courts in the decisions holding that the former Court of Customs and Patent Appeals and Court of Claims were not Article III courts. *Ex parte Bakelite,* 275 U. S. 438, 49 S. Ct. 411 (1929); *Williams* v. *United States,* 289 U. S. 553, 53 S. Ct. 751 (1933).

Those decisions provide no basis for the assumption that the judicial power of Article III may be vested in a non-tenured court. They rest, rather, on the fact that the matters committed to those courts did not necessarily fall within the judicial power, as defined in Article III, at all. As stated in *Murray's Lessee* v. *Hoboken Land & Improvement Co.,* 59 U. S. (18 How.) 272, 284 (1856), on which *Ex parte Bakelite* relied:

> There are matters, involving *public rights,* which *may* be presented in such form that the judicial power is capable of acting on them, and which are *susceptible* of judicial determination, but which Congress *may or may not* bring within the cognizance of the courts of the United States, as it may deem proper. (Emphasis added.)

Consonant with that principle, the Court in *Bakelite* reasoned that the determinations committed to the Court of Customs and Patent Appeals were "matters, arising between the government and others" which included "nothing which

inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, *committed exclusively to executive officers." Id.*, at 458 (emphasis supplied). Consequently, Congress could also repose such determinations in a non-tenured "legislative" court. The same principle was followed in *Williams* v. *United States, supra.* See also *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission,* 430 U. S. 442, 455, 97 S. Ct. 1261 (1977).[18]

This distinction makes eminent sense in terms of the purposes of Article III, for the claim of a right to a decision uninfluenced by Congress or the Executive is obviously less compelling when those branches could have made the decision in the first place. Thus the basis of *Murray's Lessee* and *Bakelite* was that Congress could leave the customs matters to a nontenured court because it could have, and historically always had, sidestepped the courts altogether.[19]

Nothing of the sort can be said of the jurisdiction conferred on the bankruptcy courts. Bankruptcy cases, in respect of the type of issues here involved, are not controversies "between the government and others", but rather are private litigations involving private rights between private parties. As the govern-

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[18] *See* Katz, *Federal Legislative Courts,* 43 Harv. L. Rev. 894, 916-17 (1930): "The only matters which the *Bakelite* doctrine permits to be taken from the constitutional courts and vested in legislative courts are those which Congress could, apart from that decision, commit to final determination of executive officers". As Justice Van Devanter wrote for the Court in *Bakelite,* in such cases, "Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals"—and it may vest it in "legislative courts" not subject to the restrictions of Article III. (*Id.* at 451).

[19] Thus as the Court in *Murray's Lessee* pointed out:

> "We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the laws of the land, a summary method for the recovery of debts due to the Crown, and especially those due from the receivers of the revenue." *Id.* at 277.

ment concedes, "[b]ankruptcy proceedings primarily concern the relationship between an insolvent debtor and his creditors". (Br. U.S. 33-34).

The government attempts to avoid this unmistakable principle by arguing that "bankruptcy proceedings involve the conferral of a public benefit and implicate the public interest in a way that ordinary suits between private litigants do not". (Br. U. S. at 34). The "public benefit" to which the government refers is "[t]he discharge in bankruptcy of a debtor's obligations". (*Id.*) But it is not the grant or denial of a discharge, or the approval of a plan of reorganization or composition, that is in issue here. We are here concerned with the adjudication of private rights. The effort to assimilate this "benefit" to the "public rights" involved in *Bakelite* or *Murray's Lessee* is nothing but a play upon words. In this sense, *every* private adjudication results in a "public benefit . . . conferred by the government"—a judgment that fixes the rights of the parties and, in effect, may discharge a party from the claims of his adversary.

To be sure the decision to grant or deny a discharge or approve a plan need not be considered as an exercise of judicial power; conceivably this function could be vested in a non-judicial, non-Article III agency. But the adjudication of private rights as provided by the Act and involved here is plainly an exercise of judicial power which, if vested by Congress in a federal court, may be vested only in an Article III court.

c. Military Courts.

For similar reasons, it is equally clear that military courts are not vested with judicial power as defined in Article III. They are created by virtue of the historic and fundamental sovereign power over the military, vested by the Constitution in the President as Commander in Chief and in the Congress. The basis for such courts was explained by this Court very early in *Dynes* v. *Hoover*, 61 U. S. (120 How.) 65, 79 (1858), where the Court in dictum upheld the trial of servicemen by *ad hoc* courts-martial: "Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then

and now practiced by civilized nations; . . . *the power to do so is given without any connection between it and the 3d article of the Constitution. . . .*" (emphasis supplied).[20]

Moreover, this Court has carefully and narrowly confined the jurisdiction of the military courts. In *United States ex rel. Toth* v. *Quarles,* 350 U. S. 14 (1955), it held unconstitutional an attempt to extend the jurisdiction of such courts beyond those persons actually in, or convicted while in, military service; it held that an Act of Congress providing for such extension of military court jurisdiction "necessarily encroaches on the jurisdiction of federal courts set up under Article III. . . ." (*Id.,* at 15-16). Similarly, in *O'Callahan* v. *Parker,* 395 U. S. 258 (1969), this Court held that military courts could not exercise jurisdiction over non-service connected crimes committed by a serviceman.

Clearly, these cases do not support the government's position in this case.

3. The Attempted "Analogy" to Administrative Agencies Does Not Support the Bankruptcy Courts.

The government suggests that since some administrative agencies perform "adjudicatory functions", it follows that Congress may create non-Article III courts to adjudicate all issues, including the types of issues involved in this case. But as has been recognized at least since the decision in *Murray's Lessee, supra.,* 59 U. S. (18 How.) at 280-81, not all "adjudicatory functions" are necessarily exercises of "judicial power"; preliminary determinations of fact and law, without coercive or enforcement power, may in appropriate settings fall within the executive or legislative domain. As the government recognizes, however (Br. U. S. at 33-34), the "adjudicatory" functions of administrative agencies are limited. Such agencies are not the delegates of a roving commission to try cases and enforce their judgments; in fact they may not constitutionally do so. *ICC* v.

[20] The Court reaffirmed this conclusion as recently as 1971. *Relford v. Commandant,* 401 U.S. 355 (1971).

Brimson, 154 U. S. 447, 485, 14 S. Ct. 1125 (1894).[21] Thus in *Crowell* v. *Benson*, 285 U. S. 22, 52 S. Ct. 285 (1932), the subject matter was a federally created right to workmen's compensation; the administrative agency's authority was narrowly confined; the agency had no power to enforce its own award; its authority was to investigate and to make factual findings and determine the amount to be paid under the statute's formula—resort was required to the Article III courts for enforcement. The agency could not even finally decide that it had jurisdiction of the parties—in fact, this Court decided that the District Court had properly held a *de novo* hearing and set aside the agency's award, on the "fundamental" or "constitutional" issue of whether a master-servant relationship existed. (*Id.* at 65).[22] By contrast, the non-Article III judges and courts under the 1978 Act are given full judicial power to decide controversies and to enforce their orders, and the bankruptcy court's decision to take jurisdiction of litigation "is not reviewable by appeal or otherwise". (28 U. S. C. § 1478(b)). These are not like the powers of administrative agencies; they are judicial in form and fact.

Moreover, not only do administrative agencies not exercise "judicial power" including the power to enforce judgments, but also there are limits on the power of administrative agencies to function where "public rights" involving matters "between the government and others" are not involved. This Court recently had occasion to reaffirm this point by reference to the distinction earlier pointed out in *Murray's Lessee:*

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[21] As this Court held in *Brimson*, an administrative agency "could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of a fine or imprisonment." *Id.*, at 485.

[22] Chief Justice Hughes, for the Court, stated that to allow Congress to "substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency . . . for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend, . . . would be to sap the judicial power as its exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts. . . ." (*Id.* at 56-57).

> "Our prior cases support administrative fact-finding in only those situations involving 'public rights,' *e.g.*, where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases are not at all implicated." *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 455, 97 S.Ct. 1261, 1270 (1977).[23]

The decisions of this Court provide no basis for assuming that an administrative agency could be vested with the vast authority which is vested in the bankruptcy "judges" by the Bankruptcy Act of 1978 to decide cases ranging over the entire *corpus juris*.

In the final analysis, however, it is unnecessary and irrelevant to consider whether Congress could constitutionally employ an administrative scheme rather than a federal court for the adjudication of bankruptcy matters and, if so, on what terms. The plain fact is that Congress has not done so. It has expressly vested the bankruptcy jurisdiction here initially in the Article III district courts, 28 U. S. C. § 1471(a)(b), although in a sleight of hand this jurisdiction is immediately delegated to the new bankruptcy courts. §§ 1471(c)(e). By so doing Congress has sought the advantages of reposing bankruptcy jurisdiction in a court endowed with all the attributes of an Article III court save only the guarantee of tenure and compensation. The plain meaning of Article III is that if Congress

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[23] The Court in *Atlas Roofing Co.* repeatedly emphasized the distinction drawn in *Murray's Lessee* and repeated in *Crowell v. Benson, supra*, "between cases of private right and those which arise *between the Government and all persons subject to its authority.*" *See Atlas Roofing Co., supra*, 430 U.S. at 452, 454-56, 458. Although *Crowell* itself did involve a case of private rights, significantly, the Court in *Atlas* made only footnote reference to that circumstance and explained it as follows: "In cases which do involve only 'private rights,' this Court has accepted fact-finding by an administrative agency, without intervention by a jury, *only as an adjunct to an Article III court*, analogizing the agency to a jury or special master [citing Crowell]." 430 U.S. at 450 n. 7. (emphasis supplied). Although Congress has attempted to characterize the Bankruptcy Courts as an "adjunct" to the district courts (28 U.S.C. § 151(a)), clearly they are independent courts, not "adjuncts."

elects to vest judicial power in an "inferior court" it must do so in a court having the attributes prescribed by Article III.[24]

4. The Right of Appeal Does Not Cure the Constitutional Defect.

It would seem beyond the necessity of argument that the mere fact that there is a right of appeal to an Article III court does not avoid the constitutional requirement that the court of first instance, if otherwise subject to Article III's provisions, must comply with Article III. If it were otherwise, all district courts of the United States could be constituted with judges appointed for a term of years with compensation subject to diminution. The argument is "a frontal assault on the constitutional requirements of tenure and salary protection for 'Judges, *both* of the supreme and inferior Courts'". Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts Are Unconstitutional*, 70 Geo. L. J. 297, 307 (1981). The fact that there is an appeal to an Article III court does not avoid the constitutional imperative that *all* courts, and not just appellate courts, exercising the "judicial Power of the United States" must be constituted in accordance with its provisions, nor does it provide the practical assurance of an impartial trial.[25] *See also United States* v. *Raddatz*, 447 U. S. 667, 100 S. Ct. 2406 (1980) (*de novo* review under Magistrates' Act discussed).

5. The Uncontrolled Delegation of Article III Power to the Bankruptcy Courts Cannot Be Reconciled With *United States* v. *Raddatz*.

In *United States* v. *Raddatz*, 447 U. S. 667, 100 S. Ct. 2406

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[24] Similarly, the Seventh Amendment requires that if Congress elects to use judicial means for enforcing rights it creates, the right to jury trial attaches. *Curtis v. Loether*, 415 U.S. 188, 94 S.Ct. 1005 (1974).

[25] As this Court said long ago: If the safeguards of the federal judiciary operate only on appeal, litigants "will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal." *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 833 (1824).

(1980), this Court clearly indicated the protections which must be available in order to render a delegation of Article III judicial power to untenured personnel constitutional. Although *Raddatz* held by a narrow (5-4) majority that the District Court was not required to rehear the witnesses in ruling on a pre-trial suppression motion referred to a magistrate, it did so in terms that unmistakably set narrow limits to the delegation of functions from an Article III court to a non-Article III official. The Court emphasized that under the Magistrates Act "the district court judge alone acts as the ultimate decisionmaker" and that "The entire process takes place under the district court's total control and jurisdiction." 447 U. S. at 681. Because the statute provided that the magistrate's proposed findings and recommendations were to be subject to *de novo* redetermination by the judge, "who then exercises the ultimate authority to issue an appropriate order," *id.* at 682, this Court concluded that such a limited delegation does not violate Article III.

Four justices in *Raddatz* were of the view that delegation to a non-Article III officer of the power to hear witnesses, without a *de novo* rehearing by an Article III Judge, violated the Constitution. That delegation was approved by a narrow margin only because effective control over the matter remained with the Article III Judge. As the concurring Justice (Blackmun) observed:

> Although Mr. Justice Marshall [in dissent] ably argues that this characterization of the magistrate procedure clashes with Article III, I am not persuaded. As the Court observes, the handling of suppression motions invariably remains completely in the control of the federal district court. The judge may initially decline to refer any matter to a magistrate. When a matter is referred, the judge may freely reject the magistrate's recommendation. He may re-hear the evidence in whole or in part. He may call for additional findings or otherwise "recommit the matter to the magistrate with instructions." . . . Moreover, the magistrate himself is subject to the Article III judge's control. Magistrates are appointed by district judges, § 631(a), and subject to removal by them, § 631(i). In addition, district judges retain plenary authority over when, what, and how many pretrial matters are assigned to magistrates . . . Thus the only conceivable danger of a

"threat" to the independence of the magistrate comes from within, rather than without, the judicial department. 447 U. S. at 685.[26]

The contrast with the new bankruptcy courts could not be more extreme. Under the Act, no control remains in the district court over the activities of a bankruptcy judge such as exists over those of a magistrate (or a master). The bankruptcy court's powers and attributes, described earlier, are in every material respect the opposite of a magistrate's (or a master). Thus, for example, (1) the jurisdiction of the bankruptcy court is original and exclusive, not upon reference by the district court or subject to its withdrawal power; (2) the district judge may not freely reject the decisions of the bankruptcy court, but must review matters, if not displaced entirely by a panel of bankruptcy judges, only within the strictures of an appeal; (3) no additional evidence may be heard; and (4) the district court has no control over appointment or removal.

Raddatz rejects any such delegation of judicial power as the Act provides to the bankruptcy courts unless Article III protections are provided. Indeed, if the new bankruptcy courts were validated, it would be but a short step to the creation of a separate and independent magistrate system apart from Article III and in stark derogation of *Raddatz*.[27]

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[26] The same lack of threat from without was true under the old bankruptcy referee system since referees were appointed and removed by the district court. 11 U.S.C. § 62(b). The new Act changes all that and makes them subject to executive and legislative control. Moreover, under the 1898 Act, referees were essentially like magistrates. See General Order Nos. 1, 12(2), 47 (1939). Under the 1973 Rules, district court control over referees remained, but shifted from the order of reference and power to rehear evidence to the power to "withdraw a case in whole or part from a referee" at any time. Bankruptcy Rule 102(b).

[27] In *Crowell v. Benson, supra,* this Court was also careful to indicate that in order to survive constitutional muster, delegation of fact finding authority by Article III courts must be only with appropriate district court supervision. Thus the Court noted that every jury trial in Federal Courts is "under the constant superintendence of the trial judge." In addition,

(Footnote continued on following page.)

CONCLUSION

The vital importance of guarding the integrity of the judiciary article of our Constitution should need no elaboration now. The authors of the Constitution recognized the perils implicit in the vast powers of the federal government. As this Court emphasized only last term, in *United States* v. *Will*, 449 U. S. 200, 101 S. Ct. 471 (1980), conformity with Article III is basic to our system of government and to our freedom.

We know of no way in which the issue in the present case can be decided without creating a major breach in our constitutional system; the government's brief demonstrates the startling sweep of the principles which must be utilized to reach its conclusion. They argue that Congress may ignore Article III, in the exercise of any of its specific legislative powers, such as under Article I; that it may place jurisdiction to decide, and power to enforce the decisions, in non-constitutional "courts" and "judges", dependent for periodic appointment and assurance of compensation upon the political process and powers.

In essence, we are confronted here by a bold plan to create a separate system of federal courts, with its own judges and staff, supplanting the district courts across a broad range of their jurisdiction, divorced of judicial control of its operations, and in violation of the judicial article of our Constitution.

(Footnote continued from preceding page.)

> "Where testimony in an equity cause is not taken before the court, the proceeding is still constantly subject to the court's control. And while the practice of obtaining the assistance of masters in chancery and commissioners in admiralty may be regarded, as we have pointed out, as furnishing a certain analogy in relation to the normal authority of the deputy commissioner in making what is virtually an assessment of damages, the proceedings of such masters and commissioners are always subject to the direction of the court and their reports are essentially advisory, a distinction of controlling importance when questions of a fundamental character are in issue." 285 U.S. at 61.

We respectfully submit that the judgment below should be affirmed, with the consequence that this matter will be reconsidered by the Congress so that a legislative plan may be devised which is in accordance with our basic institutions.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NORTHERN PIPELINE CONSTRUCTION CO.,
Appellant

v.

MARATHON PIPE LINE CO.,

and

UNITED STATES,
Appellees

UNITED STATES,
Appellant

v.

MARATHON PIPE LINE CO., et al.,
Appellees

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

BRIEF OF COMMERCIAL LAW LEAGUE OF AMERICA, AMICUS CURIAE, IN SUPPORT OF APPELLANTS

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BRIEF OF COMMERCIAL LAW LEAGUE OF AMERICA, AMICUS CURIAE, IN SUPPORT OF APPELLANTS

Pursuant to Rule 36 of the Rules of this Court, the Commercial Law League of America respectfully submits this brief, as Amicus Curiae, in support of the appellants in the above-entitled appeals. All parties to these appeals have executed written consents which have been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

The Commercial Law League of America ("the League") is a national organization of more than 6,000 members having an active professional interest in the area of debtor and creditor relationships, insolvency and bankruptcy proceedings. Approximately 90% are practicing attorneys devoting the major portion of their time to commercial, bankruptcy and related matters. The remainder are law professors, bankruptcy judges and representatives of recognized commercial agencies and commercial law lists.

The League has long been an advocate of a functionally independent bankruptcy court with full jurisdiction over all matters arising out of or related to a bankruptcy proceeding. The League testified in support of such a court structure before the Bankruptcy Commission and also before both Houses of Congress.

The League is vitally interested in this case because of the threat posed by the decision below to the independent court system which was created by Congress, in response to the suggestions of the League and numerous other organizations, as an inherent and essential feature of its comprehensive overhauling of the bankruptcy law. That decision, if affirmed, could throw our entire system of bankruptcy administration into absolute chaos and cause severe disruption of the basic legal framework within which credit is granted and received in the United States.

SUMMARY OF ARGUMENT

The Bankruptcy Reform Act of 1978 was the result of an intensive study by Congress of the nation's substantive and procedural law on the subject of bankruptcy and reorganization. That study convinced Congress of the need for an independent bankruptcy court with full jurisdiction over all phases of the bankruptcy process. That study also convinced Congress that the desired objective could be constitutionally

achieved by creation of a system of non-tenured bankruptcy courts, each sitting as an adjunct to the United States District Court for its particular judicial district.

Contrary to the unsupported conclusion expressed by the court below, the expanded jurisdiction conferred on the bankruptcy court was not a "delegation of authority . . . to try cases which are otherwise relegated under the Constitution to Article III judges" (12 B. R. 946, at 947). The limitations on the jurisdiction of the bankruptcy courts created by the former Act of 1898 were not based on subject matter, but rather on such extraneous criteria as possession and/or consent. Every type of issue or controversy over which the bankruptcy courts have jurisdiction under the statute held unconstitutional by the court below, could have been and was, if either possession or consent were present, subject under the former law, to the so-called summary jurisdiction of the non-tenured bankruptcy court. On the other hand, most of the cases in which so-called plenary suits were necessary under the former law were required to be tried in non-tenured state courts, and the remainder could be brought in either state or federal courts at the option of the plaintiff (Bankruptcy Act § 23, 11 U. S. C. § 46).

The court below failed to follow any of the clearly marked guidelines delineating judicial review. It gave virtually no consideration to the deliberations and findings of the Congress, either as to the need for the new court structure or as to its constitutionality. It made no attempt either to construe the statute in a manner consistent with constitutional proscriptions, as it interpreted them, or to limit its determination to those portions of the statute which it found offensive. It similarly made no attempt to determine the case before it on non-constitutional grounds.

Finally, we would urge the Court, if it should find the existing court structure to be constitutionally objectionable, to limit its order so that it will only apply prospectively.

ARGUMENT

I.

THE DISTRICT COURT FAILED TO GIVE DUE CONSIDERATION TO THE FINDINGS AND DETERMINATIONS OF THE CONGRESS

A.

Intensive Congressional Investigation Demonstrated the Need for a Functionally Independent Court With Full Jurisdiction Over All Matters Related to a Bankruptcy Case.

The Bankruptcy Reform Act of 1978 (P. L. 95-598, approved November 6, 1978) represented the culmination of more than eight years of intensive study, hearings and debate concerning every aspect of the bankruptcy and reorganization process. That study was originally mandated by Congress when it created a special high-level Commission for the express purpose of recommending improvements in the existing system of bankruptcies and insolvencies.

The Commission, over a period of some three years, conducted an intensive and exhaustive survey of the existing bankruptcy law and the existing court structure. It sought, and received, input from countless individuals and organizations (including the League) having expertise, and interest, in the administration of bankruptcy and insolvency proceedings.

Notwithstanding the wide disparity of opinions and recommendations received by the Commission on most aspects of substantive and procedural bankruptcy law, there was a surprising unanimity of opinion on the need for an independent bankruptcy court with full jurisdiction over all issues arising in, or related to a bankruptcy case. As the Commission noted at

page 90 in its report filed July 30, 1973 ("The Commission Report")[1]:

> "A comprehensive grant of jurisdiction to the bankruptcy courts over all controversies arising out of any bankruptcy or rehabilitation case would greatly diminish the basis for litigation of jurisdictional issues which consumes so much time, money, and energy of the bankruptcy system and of those involved in the administration of debtors' affairs. It would foster the development of a more uniform, cohesive body of substantive and procedural law which would be applicable to the administration of estates under the Bankruptcy Act."

The deliberations and report of the Bankruptcy Commission were followed by an equally intensive study and examination of the bankruptcy system conducted by the respective Judiciary Committees of both Houses of Congress. During the five year period from 1973 when the Commission's suggested bill was first introduced, through 1978 when the Bankruptcy Reform Act was ultimately adopted, the Congress solicited and received proposals, testimony and memoranda from every group in the nation interested in any phase of the bankruptcy process and considered at least four separate and distinct pieces of comprehensive legislation.[2]

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[1] The Commission Report, in its entirety, along with the complete Report of the House Judiciary Committee on the proposed legislation is reproduced in full, with original pagination, in Collier on Bankruptcy (15th Ed.) Appendix Volume 2. The Senate Judiciary Committee Report is similarly reproduced in Appendix Volume 3.

[2] Bill originally proposed by the Commission (S.2565 and H. R. 10792, 93rd Congress; Bill introduced by National Conference of Bankruptcy Judges (S.4046 and H. R. 16643, 93rd Congress); Bill ultimately reported out by Subcommittee on Civil and Constitutional rights of the House Judiciary Committee (H. R. 6, 8200, 95th Congress); Substitute Bill reported out by Subcommittee on Improvements in Judicial machinery of the Senate Judiciary Committee (S. 2266, 95th Congress).

Like the Commission before them, both Houses of Congress discovered the same virtual unanimity of opinion favoring the creation of an independent bankrutpcy court with full and complete jurisdiction. The Judiciary Committee of the House of Representatives in its Report No. 95-595 accompanying H. R. 8200 (House Committee Report) noted:

> "The concept of a Bankruptcy Court that is separate and independent from the District Court has been nearly universally supported. The Commission on the Bankruptcy Laws proposed it. The National Bankruptcy Conference testified in support of the proposition. The Commercial Law League of America and the American Bankers Association urged the Subcommittee to create an independent court system. Finally, the American Bar Association, at its 1976 meeting and the Association of the Bar of the City of New York have called for the creation of an independent bankruptcy court (House Committee Report 18).
>
> * * *
>
> Under the current bankruptcy law, the jurisdiction of the bankrutpcy court is limited by the concept of possession, either actual or constructive, or consent, either express or implied. An enormous case law has developed around this provision. Volumes have been written on what constitutes adequate possession to give the bankruptcy court jurisdiction and on what constitutes adequate consent. The Bankruptcy Court Rules promulgated by the Supreme Court take the position that a failure to object to jurisdiction, constitutes consent. One bankruptcy judge has termed this 'jurisdiction by ambush'. The issue of the jurisdiction of the Bankruptcy Court has been litigated in every volume of the Federal Reporter. Intervening amendments of the Bankruptcy Act have not significantly affected the volume of this litigation. In an area of law in which time is of the essence, the delay attendant upon litigation over jurisdiction is needless and expensive. (House Committee Report 43).
>
> * * *
>
> There are several objectionable results to the division of jurisdiction of the judicial business generated by bankruptcy cases. The first is delay. Not only are the

> proceedings in non-bankruptcy courts likely to be paced more slowly with longer intervals between successive steps, but the dockets of the non-bankruptcy courts are likely to be more crowded and commencement of the trials more likely to be postponed in such courts than in bankruptcy courts. Delay is critical in cases under the Bankruptcy Act, particularly in the business cases where litigation is most likely to occur. This is true because of the prejudicial effect it might have on prospects for rehabilitating an enterprise in financial distress and the aggravated risk of deterioration of the estate in the course of liquidation. (House Committee Report 44-45).

In thus concluding that the creation of an independent bankruptcy court with full jurisdiction was essential to a meaningful reform of the bankruptcy system, the House Judiciary Committee specifically noted the concern which this Court has consistently expressed for the prompt and expeditious administration and settlement of bankruptcy cases, citing Ex parte *Christy,* 3 Howard 292, 312 (1845); *Bailey* v. *Glover,* 88 U. S. (21 Wall) 342, 346 (1874); *Wiswall* v. *Campbell,* 93 U. S. 347, 350-351 (1876); *U.S. Fidelity Co.* v. *Bray,* 225 U. S. 205, 218 (1912); and *Katchen* v. *Landy,* 382 U. S. 323, 328-9 (1966) (House Committee Report 45, note 26).

The Senate reached a similar conclusion. Report of the Senate Judiciary Committee No. 95-989 accompanying S.2266 (Senate Committee Report) stated:

> "The need for a functionally independent bankruptcy court has been demonstrated beyond question, first by the study and recommendations of the Commission on the Bankruptcy Laws of the United States, by knowledgable witnesses before the Subcommittee, in published commentary, as well as through long practical experience under the present referee system . . . (Senate Committee Report, 15-16
>
> . . . .
>
> A major impetus underlying this reform legislation has been the need to enlarge the jurisdiction of the bankruptcy

court, in order to eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction, a wasteful remnant of the referee system left over from the pre-Chandler Act era. For fully four decades, and more notably during the present decade, referees in bankruptcy have served as trial judges of the bankruptcy court whose orders are final unless a timely appeal is taken to the district court. Yet the jurisdictional limitations presently imposed on the bankruptcy courts have embroiled the court and the parties in voluminous litigation whose sole function is to determine whether the court possesses the requisite summary jurisdiction to determine the merits of issues often necessarily heard by the court in determining its jurisdictional question. Upon a finding that it lacks summary jurisdiction, the bankruptcy court is required to dismiss the action, whereupon it is necessary for the parties to proceed anew with the plenary action in either the U. S. district court or appropriate state court to try issues already substantially tried in the summary proceeding before the bankruptcy court. Frequently, the liquidation of bankrupt estates in the rehabilitation of debtors are significantly prejudiced thereby.

The advent of the Rules of Bankruptcy Procedure, with their automatic reference of most bankruptcy matters to the referee in bankruptcy and their scrupulous insistence upon procedural due process, have underscored the absurdity of perpetuating these jurisdictional limitations in bankruptcy cases arising under Title 11 and civil actions and proceedings arising under or related to cases under Title 11." (Senate Committee Report 17-18).

The court structure ultimately created[3] was, in the opinion of Congress, and in the opinion of the League, an absolute essential to any meaningful reform of the bankruptcy law. It should not be lightly discarded.

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[3] The new Bankruptcy Court, as such, will not come into existence until April 1, 1984. (Reform Act § 402(b)). During the transition period, however, the existing bankruptcy judges are retained in office and vested with substantially the same jurisdiction as that to be vested in the new court (Reform Act § 405(a)).

B.

The Constitutionality of the New Court Structure Was Carefully Considered by the Congress.

At the same time that both Houses of Congress considered the need for a functionally independent court with full jurisdiction, they were equally concerned with the need to comply with the Constitution. Opinions were sought and received not only from some of the leading scholars in the nation, but also from the Department of Justice and the Judicial Conference.

After due considerations of the opinions which it received[4] the House originally proposed and passed a bill (H. R. 8200) calling for a separate Article III bankruptcy court. That proposal would have been clearly constitutional, but was strenuously opposed on policy grounds by, among others, both the Judicial Conference and the Department of Justice.[5]

The Senate Judiciary Committee, through its Subcommittee on Improvements In Judicial Machinery, undertook to find a solution which would meet the objections raised to an Article III court but still comply with the Constitution. The Committee proposed, and invited comment on, a bankruptcy court of non-tenured judges, which, while functionally independent would remain as an adjunct of the United States District Court.

The reaction to the adjunct court proposal was quite positive. Attorney General Bell, speaking for the Department of Justice, noted:[6]

"Although the Department of Justice believes that a nontenured or Article I court raises constitutional ques-

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[4] House Committee Report, pp. 63-87.

[5] House Committee Report, 18-20, 32 n. 203; Hearings before Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary of the United States Senate, 95th Congress on S.2266 and H. R. 8200 Nov. 28, 29 and Dec. 1, 1977 (Senate Hearings) 544.

[6] Senate Hearings 544.

> tions, and, although we cannot support an independent tenured or Article III court for what I regard as sound policy reasons, *we can support a bankruptcy court with new and expanded powers and resources that will, however, continue to operate as an adjunct of the district court.* (Emphasis added)

Even more significant was the following testimony submitted by Circuit Judge Ruggero J. Aldisert of the Court of Appeals for the Third Circuit, on behalf of the Judicial Conference:[7]

> "I would open by saying that the committee endorses completely the concept of jurisdiction embodied in Senate bill 2266. We thank you, Mr. Chairman, for introducing a bill which, in its jurisdictional provisions, reflects the concerns felt by this committee representing the Judicial Conference of the United States. . . .
>
> *We believe that the bankruptcy judge could handle this increased jurisdiction without the necessity of being an Article III Judge.* (Emphasis added)
>
> . . . .
>
> I would like to emphasize, Mr. Chairman, that it is very unusual to get a group of Federal judges to agree on anything. I suppose we are the great rugged individualists. Being a member of an appellate court where there are frequently majority, concurring, and dissenting opinions, I know the life of majority and minority reports.
>
> But I think it is very significant that, when it came to the question, not as to a decision as to whether there should be an Article III judge or another type of judge, but strictly from the juris prudential standpoint, *from the standpoint of the constitutionality of the bankruptcy judge assuming increased powers, there was unanimity in this committee and there was unanimity in the Judicial Conference of the United States that Article III status was not necessary to assume that expanded jurisdiction.* Circuit conferences, consisting of every district and every circuit

[7] Senate Hearings 412-44.

judge within a circuit, have concluded that an Article III judge is not necessary. The only circuit conferences that have not so concluded are the first circuit and the District of Columbia Circuit, because the question was not presented to them. (Emphasis Added)

I think that is extremely significant."

Following the hearings, the Senate Committee concluded that by establishment of the new court as a non-tenured adjunct to the district court, Congress could meet the "need for a functionally independent bankruptcy court" and that "certain perceived constitutional impediments to the exercise of ... judicial power of the United States ... [would] thus [be] eliminated." Senate Report 15-16.

That adjunct court concept, with minor modifications, was ultimately enacted into law. It should have been upheld by the court below.

C.

The Court Structure Created by Congress Was Entitled to the Presumption of Constitutionality.

This Court has traditionally and consistently exercised great restraint whenever an act of Congress is under constitutional attack. The presumption of validity and constitutionality which attaches to an act of Congress has consistently and repeatedly been noted by this Court in opinions such as *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 15, (1976); *United States* v. *National Dairy Co.*, 372 U. S. 29, 32 (1963). Seldom, if ever, has this Court struck down a Federal statute without making every possible attempt to reconcile the Congressional findings and intent with Constitutional requirements.

It was error for the district court to reject the proposed statute without giving even the slightest consideration to the

Congressional deliberations and conclusions which led to its adoption. The appropriate approach to be taken in this case is that demonstrated in *Palmore* v. *United States,* 411 U. S. 389 (1973), where this Court upheld the non-tenured courts established for the District of Columbia, saying at pages 407-408:

> "It is apparent that neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Article III Court before a judge enjoying lifetime tenure and protection against salary reduction. Rather, both Congress and this Court have recognized that state courts are appropriate forums in which federal questions and federal crimes may at times be tried; and that the requirements of Article III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accomodate plenary grants of *power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment.*" (Emphasis added).
>
> "From its own studies, Congress had concluded that there was a crisis in the judicial system of the District of Columbia, that case loads had become unmanageable and that neither those matters of national concern nor those of strictly local cognizance were being promptly tried and disposed of by the existing court system. The remedy in part, was to relieve the regular Article III courts . . . from the smothering responsibility for the great mass of litigation, civil and criminal, that inevitably characterizes the court system in a major city and to confine the work of those courts to that which, for the most part, they were designed to do . . . The other part of the remedy, equally essential, was to establish an entirely new court system with functions essentially similar to those of the local courts found in the 50 States of the Union with responsibility for trying and deciding those distinctively local controversies that arise under local law, including local criminal laws having little, if any, impact beyond the local jurisdiction."

The analogies between *Palmore* and this case are striking. Congress had determined, based on an exhaustive study that the existing bankruptcy court structure was not adequately meeting the needs of the modern economy. Congress had also determined that revesting in the Article III district courts of jurisdiction to hear and determine bankruptcy cases would, in the light of the already overloaded condition of the Article III courts, be "unworkable." House Committee Report 14-15, 21.

Just as in the *Palmore* case, Congress, after careful consideration, determined that it preferred, and had the power to create, an adjunct bankruptcy court of non-tenured judges. The same considerations which led this court to uphold the Congressional determination in *Palmore* should persuade it to sustain the Congressional determination made in the Bankruptcy Reform Act of 1978.

The suggestion that the rule of *Palmore* is limited to cases involving only local law, is refuted by such landmark decisions as Ex parte *Bakelite Corp.*, 279 U. S. 438, 449 (1929) and *Crowell* v. *Benson,* 285 U. S. 22, 54 (1932). In *Bakelite,* this court held the Court of Customs Appeals to be a validly created legislative court, saying:

> "It long has been settled that Article III does not express the full authority of Congress to create courts and that other Articles invest Congress with power in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution."

Similarly, in *Crowell* v. *Benson,* this Court upheld the delegation to a non-tenured administrative agency of jurisdiction to hear disputes under the National Longshoremen and Harbor Workers Compensation Act, specifically noting that Congress had legislatively determined the need for:

> ". . . a method shown by experience to be essential in order to apply its [the Act's] standards to the thousands of cases involved, ..."

In both of these cases, this Court found that Congress had authority—under Article I—to create a tribunal with jurisdiction in areas of national concern. When read together with *Palmore*, they furnish ample support for the constitutionality of the adjunct court created by the Bankruptcy Reform Act of 1978.[8]

II.

THE BANKRUPTCY REFORM ACT DOES NOT DELEGATE TO BANKRUPTCY JUDGES AUTHORITY TO TRY CASES OTHERWISE RELEGATED UNDER THE CONSTITUTION TO ARTICLE III JUDGES

The thrust of the district court's opinion is that § 1471 of Title 28 U. S. Code, as amended by the Bankruptcy Reform Act is a "delegation of authority . . . to the bankruptcy judges to try cases which are otherwise relegated under the Constitution to Article III Judges . . . ." (12 B. R. 946, at 947) That holding reveals a basic misunderstanding of both the former Bankruptcy Act of 1898 and the changes effected by the 1978 Reform Act.

The Bankruptcy Act of 1898 ("Bankruptcy Act") constituted all of the United States district courts as "courts of bankruptcy within their respective territorial jurisdictions" (Bankruptcy Act (§ § 1(10), 2a, 11 U. S. C. § § 1(10) 11(a)).

The 1898 Act specifically authorized the judges of the various courts of bankruptcy to appoint officials known as "referees." Bankruptcy Act § 34; 11 U. S. C. § 62. Although the referee's function was, at first, largely ministerial, it ultimately evolved into what was, for all practical purposes, the bankruptcy court itself. The term of office was increased from two to

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[8] Just as *Bakelite* was held to support the constitutionality of the non-tenured Tax Court which was specifically created by Congress as an Article I court to hear matters of national concern (26 U. S. C. § 7441). *Nash Miami Motors* v. *Commissioner*, 358 F. 2d 636, 637-8 (5 Cir. 1966) cert. den. 385 U. S. 918; *Burns, Stix, Friedman & Co.* v. *Commissioner*, 57 T. C. 392, 394, 395-398 (1971).

six years (Bankruptcy Act § 34, 11 U. S. C. § 62). The old fee system was abolished and replaced by a stipulated salary subject to adjustment in accordance with the Federal Salary Act of 1967 and § 461 of Title 28 United States Code (Bankruptcy Act § 40(a)). Orders of referees were expressly made final except where the aggrieved party filed a timely petition to seek review by the District Judge within ten days after entry (Bankruptcy Act § 39(c); 11 U. S. C. § 67(c)).

A particularly important development in this connection was the issuance by this Court in 1973 of the Rules of Bankruptcy Procedure. A primary theme underlying those Rules was:

> "... a purpose to emphasize the judicial in contradistinction to the ministerial functions of the referee in bankruptcy administration and to enhance the dignity of the office as that of the *principal judge of the bankruptcy court*". (Emphasis added). Advisory Committee Note To Preliminary Draft, (Collier 1981, pamphlet edition, Bankruptcy Rules p. 5).

Among the many provisions of the Rules which thus enhanced the dignity and status of the non-tenured referee as principal judge of the bankruptcy court were:

(a) Rule 102 providing for automatic reference of all bankruptcy cases to a referee for virtually all purposes subject only to the rarely-exercised right of withdrawal for convenience of the parties or other cause;

(b) Rules 115 and 409(c)(2) providing for the authority of a referee to conduct a jury trial in certain prescribed situations;

(c) Rule 116 authorizing the transfer of cases by referees;

(d) Rules 801ff., inclusive, substituting a true appeal procedure with respect to referee's orders for the "petition for review" prescribed by § 39(c) of the Bankruptcy Act;

(e) Rule 810 codifying the numerous decisions requiring acceptance of a referee's findings of fact on appeal unless

clearly erroneous and eliminating the authority of the district court to receive further evidence on appeal;

(f) Rule 901(7) specifically authorizing the use of the term "bankruptcy judge" as an appropriate designation for the referee.

The non-tenured bankruptcy court which thus developed was a true court in every sense of the word. It heard testimony, received evidence and rendered judgments which were final and enforceable except where appeals were taken within the time, and in the manner which the Rules prescribed. Furthermore, its jurisdiction could and did extend to every type of question of federal and/or state law which could possibly arise in a bankruptcy setting.[9]

The scope and extent of the subject matter jurisdiction of the bankruptcy court under the former law is apparent from just a few examples. The bankruptcy court from its inception has had exclusive jurisdiction to hear and determine the validity, priority and extent of claims against the estate including any tax claims not previously contested before and adjudicated by a competent non-bankruptcy tribunal. Bankruptcy Act, § 2(a)(2A), 11 U. S. C. §§ 11(a)(2A). Provable debts under the Bankruptcy Act included every type of a claim arising out of any contract, express or implied; taxes due and owing to any federal, state or local government, awards of industrial commissions or similar bodies, rights to recover damages in an action for negligence instituted prior to bankruptcy, contingent debts and contingent contractual liabilities and claims for anticipatory breach of contracts or leases.

[9] There were, of course, extensive and troublesome limitations on the court's jurisdiction. These limitations, however, had nothing whatsoever to do with the nature of the substantive questions which the court was called upon to decide. On the contrary, they almost invariably rested upon the tangential questions of possession and/or consent. See Commission Report, pp. 88-89; House Committee Report 43-44; Collier on Bankruptcy, 14th Edition, Vol. 2, pp. 449ff, and cases therein cited.

Bankruptcy Act §§ 63, 64, 11 U. S. C. §§ 103, 104. There was virtually no substantive question of state or federal law which could not and did not come before a bankruptcy court in the consideration of disputed claims.

Similarly, a virtually unlimited scope of subject matter jurisdiction was exercised by the bankruptcy courts under Section 17(c)(3) of the Act (11 U. S. C. § 35(c)(3), which was adopted as part of the "Dischargeability Act of 1970." Pursuant to Section 17(c)(3), whenever the bankruptcy court determined that any debt or claim asserted against a bankrupt was not dischargeable, the court was then mandated to "determine the remaining issues, render judgment and make all orders necessary for the enforcement thereof." Again, every conceivable question of federal or state civil law could properly come before, and be decided by, the non-tenured bankruptcy court.

Finally, there was, of course, the ever present doctrine whereunder any case whatsoever could be heard and determined by the bankruptcy court, in the exercise of its so-called summary jurisdiction, if the adverse party was found to have consented thereto. Consent for this purpose was by no means required to be express or even affirmative. Filing a proof of claim was held to constitute consent to any related counterclaim, or to any action to recover a voidable transfer.[10] Similarly, consent was found wherever the adverse party had contracted with or dealt with officers of the court, such as a trustee or debtor-in-possession,[11] and/or had failed specifically to contest the court's jurisdiction within a specified time (Bankruptcy Act § 2a(7), 11 U. S. C. § 11(a)(7), Rule 915(b), Rules of Bankruptcy Procedure).

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[10] *Katchen* v. *Landy*, 328 U. S. 323, 333-336 (1966), In re *Majestic Radio and Television Corp.*, 227 F. 2d 152, 156 (7 Cir. 1955).

[11] In re *F. W. Koenecke & Sons, Inc.*, 369 F. Supp. 558, 561 (N. D. Ill. 1973) and authorities collected therein.

There was, therefore, no question of federal or state law which could not be, and which was not, in fact, litigated before, and decided by non-tenured referees in bankruptcy under the former Act. These referees decided controversies encompassing the entire range of civil law and involving amounts running into millions of dollars. Yet throughout the entire history of the Bankruptcy Act, not one serious challenge was ever raised to the constitutionality of the court system thus created or to the legitimacy and/or enforceability of the judgments and determinations rendered thereby.

Every argument advanced by the court below with respect to the constitutional infirmity of the present court system could have been applied with equal force to the court system under the former law. Unless this Court should now conclude that we have been operating under an unconstitutional structure for at least the last forty years, it must reverse the decision of the district court.

The court below (12 B.R. 948, n.4) complains of the "legislative sleight of hand" whereunder the jurisdiction granted to the district courts by 28 U.S.C. subsections 1471(a) and (b) is then reposed in the bankruptcy court by subsection 1471(c). Subsection 1471(c), however, is really nothing more than the logical extension of Section 22(a) of the Bankruptcy Act (11 U.S.C. § 45) as modified by Rule 102 of the Rules of Bankruptcy Procedure.

The only changes effected by Subsection 1471(c) from the former procedure were:

> First, under the new law the initial papers are filed directly with the clerk of the bankruptcy court, rather than being filed in the first instance with the clerk of the district court who then immediately transferred them to the clerk of the referees in bankruptcy.
>
> Second, the new law contains no provision equivalent to Rule 102(b) which authorized the district judge, for convenience of the parties or other cause, to withdraw a reference and hear the case himself.

Certainly the first of these changes, being purely mechanical, effected no change in the constitutional status of the court. As to the second, if retention of the district court's power to withdraw a reference should be held to be constitutionally necessary, then the proper remedy would be to construe subsection 1471(c) as still being subject to Rule 102(b) rather than to discard the entire court structure.[12]

It is, of course, true that the new law does confer on the bankruptcy courts jurisdiction to hear and determine many cases which formerly could have been brought only in other courts. However, it is by no means true that the cases encompassed by this expanded grant of jurisdiction were cases which are "otherwise relegated under the Constitution to Article III judges." The cases which the new court can hear, and which the old court could not, are suits related to a bankruptcy case, but which did not fall within one or more of the pigeon holes of summary jurisdiction. Except in those instances, however, where a separate ground of federal jurisdiction was present, or where federal jurisdiction was conferred by consent, these suits were required to be brought in state courts;[13] in no case that we can think of were they *required* either by the Constitution, or by statutes to be brought in *federal* courts.

It is difficult, if not impossible, to see how the Constitution has been circumvented by the transfer of jurisdiction of plenary actions from non-tenured state courts completely outside the federal judicial system to a bankruptcy court which is specific-

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[12] The existing Rules of Bankruptcy Procedure, have been specifically kept in effect, to the extent not inconsistent with the Bankruptcy Reform Act or the amendments effected thereby. Bankruptcy Reform Act, P. L. 95-498, § 405(d).

[13] Bankruptcy Act § 23(b); 11 U. S. C. §46(b). That restriction did not apply to cases related to Chapter X proceedings, however, which could be brought in either federal or state court regardless of any independent ground of federal jurisdiction. *Williams* v. *Austrian*, 331 U. S. 642, 661 (1947). The same was true of actions to recover preferences and fraudulent transfers. Bankruptcy Act §§ 60 (b), 67(e); 70(e) (11 U. S. C. §§ 96(b); 107(e); 110(e).

ally created as an adjunct of an Article III court (28 U. S. C. § 151(a)), and whose final judgments and orders are appealable as of right[14] by at least one Article III court.[15]

III.

THE DISTRICT COURT DISREGARDED THE WELL-ESTABLISHED GUIDELINES APPLICABLE TO JUDICIAL REVIEW

This Court has, on many occasions, announced a set of clearly marked guidelines and limitations which are traditionally and consistently observed in the area of judicial review. These guidelines which were spelled out in detail by Mr. Justice Brandeis, concurring, in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 346-348 (1935) include the following:

> "The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' . . . 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'
>
> . . .
>
> The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'

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[14] Except that orders granting or denying a motion to abstain from all or part of a case or a motion to remand a case are not subject to review of any kind. 11 U. S. C. § 305(c); 28 U. S. C. §§ 1471(d), 1478(b).

[15] The judicial code, as amended, provides a three pronged method of appeal. If the circuit council of a circuit so orders appeals from final orders of the bankruptcy court may go to a panel of three bankruptcy judges whose judgments and orders are in turn subject to appeal as of right to the United States court of appeals for the circuit (28 U. S. C. §§ 1293, 1482). If no such panel is ordered, then the appeal shall go to the district court and thence as of right to the court of appeals (28 U. S. C. §§ 1291, 1334). Finally, if all the parties to an appeal so agree, it may go directly from the bankruptcy court to the court of appeals (28 U. S. C. §§ 1293(b).

. . .

> The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.
>
> . . .
>
> 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. . . .' "

The district court, however, made no attempt whatsoever either to reconcile the statute with the Constitution or to delineate and pinpoint the precise areas deemed incapable of such reconciliation. Both the original order and the supplemental opinion declare the entire Section 1471 of Title 28 to be unconstitutional. If sustained, that holding will, of necessity invalidate the entire court structure and throw into absolute chaos the status of all proceedings throughout the country which have been commenced in any bankruptcy court since the effective date of the Reform Act.

The rationale of the decision below, however, would seem to apply only to one subsection; namely 1471(c). Nothing in the opinion suggests that there was any impropriety whatsoever in subsections §§ 1471(a) and (b) which confer upon the district courts jurisdiction of all bankruptcy cases and all matters arising out of or related to a bankruptcy case. It is settled beyond dispute that the constitutional grant (Art. 1, Sec. 8, Clause 4) of authority to establish uniform laws on the subject of bankruptcies necessarily implies authority to grant such jurisdiction to federal courts. *Taubel-Scott-Kitzmiller Co.*

v. *Fox*, 264 U. S. 426, 430-431 (1924); *Schumacher* v. *Beeler*, 293 U. S. 367, 371-2 (1934), *Williams* v. *Austrian*, 331 U. S. 642, 652-3 n. 24, 664 (1947). Similarly, the district court did not question the validity of subsections 1471(d) and (e). The entire thrust of the opinion below is toward subsection (c) whereunder Congress directs that the jurisdiction conferred upon the district courts shall be exercised (subject to the right of appeal) by their non-tenured adjunct, viz., the bankruptcy court.

Under the established guidelines, it would have been appropriate for the district court first to determine whether there was any means by which § 1471(c) could have been construed so as to reconcile it with the constitutional standards and then, if unable to effect such reconciliation, to delineate its opinion in such a manner as to still give the greatest possible effect to the express intent of Congress.

As we have already noted, the only real difference effected by subsection 1471(c) was to eliminate the power of the district courts to withdraw a case from the bankruptcy court pursuant to Rule 102(b) of the Rules of Bankruptcy Procedure. If we assume, for the sake of argument, that elimination of this power of withdrawal was enough to run afoul of the Constitution, then the appropriate course was to construe subsection 1471(c) as not repealing Rule 102(b), so that the power to withdraw thus remained intact. On the other hand, if the district court was convinced that nothing short of full Article III status satisfied constitutional requirements, then, rather than throw out the entire court structure, it should have merely stricken those provisions of the new law which specifically conflicted with the tenure and pay requirements of Article III.[16] Either of such approaches would have done far less violence to the intent of Congress than the course actually followed below.

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[16] Cf. suggestion of Prof. Joe Desha Lucas noted at House Committee Report 74.

A particularly troublesome situation has been created because the district court disregarded this Court's mandate to avoid passing upon a constitutional question where any other ground of disposition may be available. One of the grounds on which defendant had moved to dismiss the case was that it was barred by a prior action pending in another district court.[17] Although that contention, if sustained, could have disposed of the entire case, the district court completely ignored it and proceeded to render a decision which placed a cloud of uncertainty over our entire system of bankruptcy courts.

Because of the uncertainty thus created, however, we would urge this Court to decide this important constitutional question at this time even though it might not be strictly necessary in the context of this particular case.

IV.

IF THIS COURT SHOULD FIND IT NECESSARY TO INVALIDATE THE NEW COURT STRUCTURE, THE DECISION SHOULD NOT BE GIVEN RETROACTIVE EFFECT.

We believe that we have demonstrated that the creation of the new court structure in response to a clearly demonstrated need therefor was a valid exercise of the power delegated to Congress by the Constitution. We also believe that we have demonstrated that should a possible area of invalidity be found by the court, the proper remedy would be to construe the statute in such a manner as to meet constitutional requirements and not to destroy or impair the basic grant of jurisdiction to the court itself. If, however, this Court should be convinced that the entire court structure must be discarded, or its jurisdiction substantially impaired, then we would urge the Court to

[17] That issue was discussed in depth by the bankruptcy judge. 6 B. R. 928, at 931.

specifically limit such holding to this particular case and to cases commenced from and after the date of the decision. To do otherwise would cause severe and irreparable hardship to the countless litigants who have already submitted substantial controversies to the new court and would create intolerable uncertainty and confusion with respect to the judgments, orders and decrees which have been entered since the effective date of the Bankruptcy Reform Act.

Ample precedent exists for such limitation in appropriate circumstances. A classic example is *Brown* v. *Board of Education,* 349 U. S. 294, 300-301 (1955) wherein this Court set forth the standards for enforcement of its earlier decision that segregated schools were unconstitutional (347 U. S. 483; 347 U. S. 497). In *Brown,* the Court, recognizing the need for a "practicable flexibility in shaping remedies" remanded the cases to the district courts with instructions to effectuate a transition to a racially nondiscriminatory school system "with all deliberate speed."

In similar fashion, this Court has ruled that many of its landmark decisions respecting the rights of accused criminal defendants should be applied only prospectively because retroactive application would have had a serious adverse effect on the administration of justice. *Stovall* v. *Denno,* 388 U. S. 293, 296-7 (1967); *Linkletter* v. *Walker,* 381 U. S. 618, 619-20, 629 (1965); *Johnson* v. *New Jersey,* 384 U. S. 719, 721, 726-27 (1966).

It is difficult to conceive of a situation where retroactive application of a constitutional decision would have a greater adverse effect on the administration of justice than would retroactive determination that all or a substantial portion of the proceedings and determinations of the bankruptcy courts under the Bankruptcy Reform Act might now be open to collateral attack. We urge this court to preclude any such possibility.

CONCLUSION

For the reasons above set forth, the Commercial Law League of America urges this Court to reverse the district court and to declare that Congress acted within its valid and legitimate legislative powers in the creation of the adjunct non-tenured bankruptcy court prescribed by the Bankruptcy Reform Act of 1978.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NORTHERN PIPELINE CONSTRUCTION CO.,
Appellant,

v.

MARATHON PIPELINE COMPANY and
UNITED STATES OF AMERICA,
Appellees.

UNITED STATES OF AMERICA,
Appellant,

v.

MARATHON PIPELINE COMPANY and
NORTHERN PIPELINE CONSTRUCTION CO.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE COMMITTEE ON BANKRUPTCY AND CORPORATE REORGANIZATION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

October Term, 1981

Nos. 81-150 and 81-546

NORTHERN PIPELINE CONSTRUCTION CO.,

Appellant,

v.

MARATHON PIPELINE COMPANY and UNITED STATES OF AMERICA,

Appellees.

UNITED STATES OF AMERICA,

Appellant,

v.

MARATHON PIPELINE COMPANY and NORTHERN PIPELINE CONSTRUCTION CO.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE COMMITTEE ON BANKRUPTCY AND CORPORATE REORGANIZATION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

The Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York (the "Committee"), *amicus curiae* by consent of the parties, respectfully submits this brief to address an issue of signal importance to the bar and to the administra-

tion of justice: the constitutionality of 28 U.S.C. § 1471(c), as enacted by the Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549 *et seq.* (the "Reform Act"), which permits bankruptcy courts to exercise jurisdiction of "all civil proceedings arising under title 11 or arising in or related to cases under title 11." *See* 28 U.S.C. §1471(b).[1]

We urge the Court (i) to reverse the holding below that the delegation of authority in § 1471(c) is an unconstitutional delegation of judicial power in violation of Article III of the Constitution; and (ii) to hold that § 1471(c) is a valid enactment under Congress' Article I powers.

QUESTION PRESENTED

Whether Congress has the power under Article I of the Constitution to delegate to the bankruptcy courts (composed of non-tenured judges whose compensation may be diminished) jurisdiction of all civil proceedings "arising in or related to" bankruptcy cases, as provided by 28 U.S.C. § 1471(c).

STATEMENT OF THE CASE

Proceedings Below

On January 14, 1980, Northern Pipeline Construction Co. ("Northern") filed a petition for reorganization in the United States Bankruptcy Court for the District of Min-

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[1] The Reform Act includes four titles. Title I contains the substantive bankruptcy law and is contained in 11 U.S.C § 101 *et seq.*; Title II amends 28 U.S.C. and establishes the new bankruptcy courts and grants them jurisdiction; Title III contains amendments to various federal statutes as they pertain to bankruptcy cases; and Title IV provides for the transition period before the effective date of the Reform Act: April 1, 1984.

nesota. On March 25, 1980, Northern filed a complaint in the bankruptcy court against Marathon Pipeline Company ("Marathon"), involving the same contract claims which Northern had asserted against Marathon in a pending, pre-bankruptcy action in the United States District Court for the Western District of Kentucky. Marathon moved in the bankruptcy court to dismiss Northern's complaint on the ground that the grant of jurisdiction in 28 U.S.C. § 1471(c) is unconstitutional. The bankruptcy court denied Marathon's motion.

On appeal, the district court dismissed Northern's complaint on the ground that § 1471(c) is an invalid delegation of Article III power to an Article I court. While recognizing that "in this area confusion abounds" (Jurisdictional Statement of the United States at 15a), the district court nevertheless held that bankruptcy cases are encompassed within the Article III judicial power and, accordingly, cannot be heard by Article I courts. *Id.* at 24a. The United States and Northern filed notices of appeal to this Court. Probable jurisdiction was noted on November 9, 1981.

Statute at Issue

The Court in this case is asked to review a detailed statutory scheme for the prompt and efficient disposition of the affairs of a debtor. Prior to October 1, 1979, the effective date of the Reform Act, bankruptcy cases were within the jurisdiction of the district court but were generally referred to the bankruptcy court, whose judges were appointed for 6-year terms by the district court. Section 34a of the Bankruptcy Act of 1898 (the "Act"), formerly 11 U.S.C. § 62a; Bankruptcy Rule 102. The jurisdiction of the bankruptcy court was limited to "summary jurisdiction" over controversies involving property in the actual or constructive possession of the debtor; however, in cases where

the defendant consented, or failed to assert an objection, to jurisdiction, the bankruptcy court had jurisdiction of actions involving property in the possession of third parties. Section 2a(7) of the Act, formerly 11 U.S.C. § 11a(7); *see generally,* 8 *Collier on Bankruptcy* § 311 (14th ed. 1978). A bankruptcy judge's order was appealable to the district court. Bankruptcy Rule 801.

Effective April 1, 1984, the Reform Act establishes a bankruptcy court in each judicial district as "an adjunct to the district court." 28 U.S.C. § 151. The judges of the new bankruptcy court are appointed to 14-year terms by the President, with the advice and consent of the Senate, and are subject to removal by the judicial council of the circuit for "incompetency, misconduct, neglect of duty, or a physical or mental disability." 28 U.S.C. §§ 152, 153.

The Reform Act establishes a transition period until April 1, 1984 during which the existing courts of bankruptcy continue to exist, but have the powers and utilize the procedures applicable after April 1, 1984. The terms of office of all existing bankruptcy judges are extended until March 31, 1984 or until their successors take office. Reform Act Title IV, §§ 404, 405.

The Reform Act eliminates the "summary" limitation on the bankruptcy court's jurisdiction and provides, instead, that the bankruptcy court shall have jurisdiction "of all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. § 1471(c).[2] In

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[2] 28 U.S.C. § 1471, in pertinent part, provides:

"(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the

(footnote continued on following page)

such cases, the bankruptcy court "shall have the powers of a court of equity, law and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." 28 U.S.C. § 1481.

The Reform Act provides three possible appeals from a bankruptcy court. If the circuit council has designated a panel of three bankruptcy judges to hear appeals, the panel can hear appeals from final orders of a bankruptcy court and, with leave of the panel, from interlocutory orders. 28 U.S.C. §§ 160, 1482. If no appeals panel is designated, the district court exercises appellate jurisdiction. 28 U.S.C. § 1334. Finally, if the parties agree, a direct appeal to the court of appeals may be taken from a final judgment of the bankruptcy court. 28 U.S.C. § 1293(b). The court of appeals has jurisdiction of appeals from either the district court or from the appellate panel. 28 U.S.C. § 1293.

INTEREST OF *AMICUS CURIAE*

The jurisdiction of the bankruptcy courts is an issue of enormous importance to the Committee, whose members are frequently involved in corporate reorganization proceedings and who, therefore, have a very special and particular interest in the effective administration of debtors' estates. Moreover, the recent overwhelming increase in business bankruptcies renders the prompt and expeditious processing of reorganization cases even more important, not only to

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(footnote continued from preceding page)

district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts."

the immediate parties involved, but also to all of the other persons and businesses whose welfare is economically interwoven with the welfare of a corporate debtor.[3]

It is the Committee's view that the jurisdictional grant in 28 U.S.C. § 1471(c) is an essential element of the overall reform effected by the Reform Act. In order to maximize the prospects for reorganization of a debtor, it is necessary to give bankruptcy courts the power to resolve all disputes affecting the debtor in one forum, thus avoiding the inevitable delay and diminution in the debtor's assets caused by litigation in numerous jurisdictions as well as litigation over the bankruptcy court's jurisdiction. While the Committee originally supported the granting of Article III status to bankruptcy courts,[4] it is the Committee's position that the present grant of jurisdiction is both necessary and proper in order to satisfy the particularized needs of this specialized area.

SUMMARY OF ARGUMENT

The Committee submits that affirmance of the decision below would seriously compromise important public policies concerning the efficient and effective administration of debtors' estates, without at the same time advancing the policies underlying Article III. The subtleties of the distinctions between Article I and Article III judicial power are issues which have been a source of consternation to

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[3] During the twelve month period ending June 30, 1981, the number of business bankruptcies was 66,006, as compared to 45,857 in the prior twelve months and 29,500 for the twelve month period ending June 30, 1979. Annual Report of the Director of the Administrative Office of the United States Courts 10 (1981) [hereafter 1981 AO Report].

[4] The Committee's position was expressed in a Report on S.2266, *reprinted in* 1977 Senate Hearings, *infra* n.6, at 1267, 1269.

numerous constitutional scholars as well as to the members of this Court. *Compare, e.g., Ex Parte Bakelite Corp.*, 279 U.S. 438 (1929) with *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962).[5]

In this brief, the Committee focuses on the constitutional issues as they relate to the practical considerations which compelled Congress to enact the comprehensive reform of the bankruptcy laws embodied in the Reform Act. We respectfully submit that the unification of jurisdiction over bankruptcy cases and related civil proceedings reflected in 28 U.S.C. § 1471(c) is a valid exercise of Congress' Article I power for the following reasons:

First, this Court has consistently held that all cases within the judicial power of the United States need not be tried in Article III courts, and that Congress has the power to establish Article I courts to adjudicate with respect to "specialized areas having particularized needs and warranting distinctive treatment." *Palmore* v. *United States*, 411 U.S. 389, 407-08 (1973). This case presents precisely the type of area in which such distinctive treatment is warranted. The grant of jurisdiction in 28 U.S.C. § 1471(c) is an essential provision of the pervasive bankruptcy reform which resulted from years of careful study and analysis by both Houses of Congress.[6] It is based upon the following Congressional findings:

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[5] As Justice Harlan noted in *Glidden*: The "abstractness" of the issues is "graphically demonstrated" by the fact that the record on appeal was 66 pages while the briefs extended to 533 pages exclusive of appendices. 370 U.S. at 534 n.7.

[6] Congress' deliberations concerning a revision of the bankruptcy laws fill 17 volumes. *See* A. Resnick and E. Wypyski, *Bankruptcy Reform Act of 1978: A Legislative History* (1979). The deliberations span ten years—from creation of the Commission to Study the Bankruptcy Laws of the United States to passage of the Reform Act. *See*:

(footnote continued on following page)

1. A crisis existed in the bankruptcy court system because of the increase in the volume of cases;

2. The district courts could not handle the bankruptcy caseload because of their own existing caseloads and the priority accorded other litigation;

3. Cases involving debtors could not effectively be relegated to state courts;

4. The efficient administration of bankruptcy cases required that bankruptcy courts be presided over by specialists; and

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(footnote continued from preceding page)

Bankruptcy Act Revision, Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil & Const. Rights of the House Comm. on the Judiciary, 94th Cong. 1st Sess. (1975) [hereafter 1975 House Hearings];

Bankruptcy Reform Act, Hearings on S. 235 and S. 236 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on Judiciary, Part I, 94th Cong. 1st Sess. (1975) [hereafter 1975 Senate Hearings];

Bankruptcy Reform Act of 1978, Hearings on S. 2266 and H.R. 8200 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on Judiciary, 95th Cong. 1st Sess. (1977) [hereafter 1977 Senate Hearings].

Before floor consideration, the House conducted 35 days of hearings and heard over 100 witnesses. H. Rep. No. 95-595, 95th Cong. 1st Sess. 2 (1977) [hereafter 1977 House Report].

After initial floor consideration, the House held an additional three days of hearings. *See Bankruptcy Court Revision,* Hearings on H.R. 8200 Before the Subcomm. on Civil & Const. Rights of the House Comm. on Judiciary, 95th Cong. 1st Sess. (1977) [hereafter 1977 House Hearings].

The Senate held 24 days of hearings as well, with over 60 witnesses. S. Rep. No. 95-989, 95th Cong. 2d Sess. 2 (1978) [hereafter 1978 Senate Report].

The issue of the constitutionality of the bankruptcy court was addressed in the Report on Constitutional Bankruptcy Courts (Comm. Print No. 3) of the Staff of the Subcomm. on Civil & Const. Rights of the House Comm. on the Judiciary, 95th Cong. 1st Sess. (1977).

5. There was a compelling need to enlarge the jurisdiction of the bankruptcy courts to include all proceedings involving a debtor.

In order to meet the specialized needs in the bankruptcy area, Congress created Article I courts, but limited the courts' injunctive and contempt powers and provided for review by Article III courts. Thus, the jurisdictional grant of 28 U.S.C. § 1471(c) falls clearly within Congress' Article I power to establish uniform laws on the subject of bankruptcies and yet avoids constitutional infirmity.

Second, the jurisdiction granted in 28 U.S.C. § 1471(c) of civil proceedings arising in or related to debtor cases was available to bankruptcy courts under the Bankruptcy Act where the defendant consented. The only change in the law, then, is the elimination of the requirement of consent. This change is not constitutionally significant because, as this Court has recognized, subject matter jurisdiction cannot be conferred by consent. *Mitchell* v. *Maurer,* 293 U.S. 237, 244 (1934). The jurisdiction formerly exercised by the bankruptcy court is presumptively constitutional and, since the Reform Act does not effect a constitutionally significant change in the subject matter jurisdiction of the bankruptcy court, the present statute must also be constitutional.

Third, the Article III concern with protecting the judiciary from undue legislative and executive pressure is carefully respected under the Reform Act. Indeed, in terms of removal provisions, the bankruptcy judges are even more insulated from legislative influence than are Article III judges, since Congress has the power to impeach Article III judges whereas bankruptcy judges can only be removed during their 14-year terms by the judicial council.

ARGUMENT

I.

Congress Has the Power to Establish Article I Courts With Plenary Jurisdiction Over Bankruptcy Cases.

It is fundamental that all cases within the "judicial power of the United States" need not be tried in courts whose judges are tenured and protected from salary reduction. Indeed, even though Article III, section 2, of the Constitution provides that the judicial power extends to "all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States," Congress is under no compulsion to vest any particular subject matter jurisdiction in Article III trial courts. *E.g., Stevenson* v. *Fain*, 195 U.S. 165, 167 (1904); *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 234 (1922).[7]

In 1856 this Court wrote:

> "[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

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[7] Article III, section 1 of the Constitution provides:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Article I, section 8, of the Constitution gives Congress the power "To constitute Tribunals inferior to the supreme Court."

See also, Crowell v. *Benson,* 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting).

Thus, for example, until the Act of March 3, 1875, c. 137, 18 Stat. 470, Congress did not extend the jurisdiction of federal trial courts to "cases arising under the laws of the United States." Prior to that time, certain federal question cases had been litigated exclusively in non-Article III, state tribunals. Even today, non-tenured, non-Article III state court judges have concurrent jurisdiction to determine almost all federal claims and claims involving diversity as well as exclusive diversity jurisdiction where the amount in controversy is less than $10,000. *See Testa* v. *Katt,* 330 U.S. 386 (1947); *Douglas* v. *New York, New Haven & Hartford R. Co.,* 279 U.S. 377 (1929); *Engel* v. *Davenport,* 271 U.S. 33 (1926); 28 U.S.C. § 1332.

Moreover, this Court has consistently held that Congress has the power to establish Article I courts to adjudicate with respect to specialized areas. *E.g., American Insurance Co.* v. *Canter,* 26 U.S. (1 Pet.) 511 (1828) (territorial admiralty courts); *In re Ross,* 140 U.S. 453 (1891) (consular courts); *United States* v. *Coe,* 155 U.S. 76 (1894) (Court of Private Land Claims); *Ex Parte Bakelite,* 279 U.S. 438 (1929) (Court of Customs and Patent Appeals); *Toth* v. *Quarles,* 350 U.S. 11 (1955) (military courts).

Indeed, this Court has recognized that bankruptcy is a specialized area subject to non-Article III treatment pursuant to Congress' Article I power. For example, in *Schumacher* v. *Beeler,* 293 U.S. 367, 374 (1934), this Court wrote:

> *"The Congress, by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction* to entertain [suits between trusteees and adverse claimants], and could prescribe the condi-

tions upon which the federal courts should have jurisdiction." (Emphasis added.)

And in *Taubel-Scott-Kitzmiller Co., Inc.* v. *Fox*, 264 U.S. 426, 430-31 (1924), this Court wrote:

> "*Congress has, of course, power to confer upon the bankruptcy court jurisdiction to adjudicate the rights of trustees to property adversely claimed. In matters relating to bankruptcy its power is paramount.* Hence, even if the property is not within the possession of the bankruptcy court, Congress can confer upon it, as upon any other lower federal court, jurisdiction of the controversy, by conferring jurisdiction over the person in whose possession the property is." (Emphasis added.)[8]

Two cases in particular have focused on specialized tribunals established under Congress' Article I power. In *Crowell* v. *Benson*, 285 U.S. 22 (1932), this Court upheld the power of untenured federal commissioners to determine private rights arising under the Longshoremen's and Harbor Workers' Compensation Act, subject to Article III review on issues of law. In referring to Congress' enactment of a statute for the making of compensation awards to employees, this Court wrote:

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[8] In *United States* v. *Kras*, 409 U.S. 434, 447 (1973), a case holding bankruptcy filing fees constitutional, this Court wrote:

> "The mere fact that Congress has delegated to the District Court supervision over the proceedings by which a petition for discharge is processed does not convert a statutory benefit into a constitutional right of access to a court. Then, too, *Congress might have delegated the responsibility to an administrative agency.*
>
> * * *
>
> The rational basis for the fee requirement is readily apparent. *Congressional power over bankruptcy, of course, is plenary and exclusive.*" (Emphasis added.)

> "For the purposes stated, we are unable to find any constitutional obstacle to the action of the Congress in availing itself of a method shown by experience to be essential in order to apply its standards to the thousands of cases involved, thus relieving the courts of a most serious burden while preserving their complete authority to insure the proper application of the law." (285 U.S. at 54.)

Similarly, in *Palmore* v. *United States,* 411 U.S. 389, 407-08 (1973), this Court wrote:

> "It is apparent that neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Art. III court before a judge enjoying lifetime tenure and protection against salary reduction. Rather, both Congress and this Court have recognized that state courts are appropriate forums in which federal questions and federal crimes may at times be tried; and that *the requirements of Art. III,* which are applicable where laws of national applicability and affairs of national concern are at stake, *must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment.*" (Emphasis added.)

Palmore held that Congress, under its Article I power to legislate for the District of Columbia, may provide for local criminal trials before judges who are not accorded life tenure and protection against salary reduction. In holding that the District of Columbia Court Reform and Criminal Procedure Act of 1970 was valid legislation with respect to a "specialized" area "having particularized needs

and warranting distinctive treatment," this Court relied upon the legislative history of the Act which indicated the following:

First, Congress had recognized, from its own studies, that there was a crisis in the District of Columbia judicial system because caseloads had become unmanageable for the existing courts.

Second, Congress had determined, after careful consideration, that a local court system staffed by judges without lifetime tenure was more workable and efficient than an Article III court. *Id.*, 411 U.S. at 408-09.

The case at bar presents another instance in which the legislative history reveals Congressional response to a need to legislate with respect to a "specialized" area "having particularized needs and warranting distinctive treatment." Jurisdiction under 28 U.S.C. § 1471(c) was established pursuant to Congress' Article 1, section 8, clause 4, power to "establish . . . uniform laws on the subject of Bankruptcies throughout the United States," and was found by Congress to be necessary and proper because of the following factors:

First, Congress had concluded, as in *Palmore*, that there was a crisis in the bankruptcy court system because of the volume of cases:

> "The number of people and dollar amounts involved in bankruptcy cases are staggering. As of October 1976, there were pending in the bankruptcy courts 250,000 cases, involving 250,000 debtors. In those cases, there were over 9 million scheduled creditors; over $27 billion in scheduled assets; and nearly $43 billion in scheduled liabilities. Bankruptcy judges deal daily with issues that involve millions of dollars, and frequently dozens or hundreds of jobs of em-

> ployees of struggling companies." (1977 House Report at 11; footnote omitted.)[9]

Second, Congress had concluded, as in *Palmore*, that the increased bankruptcy caseload could not be handled by the district courts:

> "The district courts are generally overburdened. Their caseload has increased dramatically in recent years without a corresponding increase in the number of judges. . . .
>
> . . . the Speedy Trial Act requires that criminal matters be given precedence on the district court calendars. The Constitution does not require a 'speedy trial' for bankruptcy matters as it does for criminal cases. Thus, criminal matters would continue to be accorded priority. However, the nature of bankruptcy is such that it, too, for practical reasons, requires expeditious disposition." (1977 House Report at 14; footnote omitted.)[10]

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[9] The number of bankruptcy filings continues to rise. More than half a million cases were filed in the year ending June 30, 1981, double the amount for 1977-78. 1981 AO Report, *supra* note 3, at 8.

[10] This Court has long recognized the special need for rapid disposition of bankruptcy cases. *E.g., Katchen* v. *Landy*, 382 U.S. 323, 328 (1966) ("a chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period' ") (*quoting Ex Parte Christy*, 44 U.S. (3 How.) 292, 311 (1845)). This concern for speedy adjudication is amply reflected in Congressional Hearings. *E.g.*, 1977 House Hearings at 161 n.1 (Testimony of Judge Cyr) ("delay effectively diminishes or extinguishes the res in litigation." There is a "need for prompt disposition of bankruptcy litigation which cannot be accommodated within the framework of courts of general jurisdiction along with their other civil and criminal litigation"); and 205; 1975 Senate Hearings at 35, 117.

United States District Court Judge King testified that, in addition to the Speedy Trial Act, 32 other kinds of cases are also accorded priority over bankruptcy cases. 1977 Senate Hearings at 417. Bank-

(footnote continued on following page)

Third, Congress had concluded that relegating cases involving a debtor to state courts would significantly impair the administration of debtors' estates. *See* 1977 House Report at 45. As Bankruptcy Judge Copenhaver testified:

> "What happens . . . is that many cases which ought to be heard, and would be heard in the bankruptcy court, hearing them expeditiously so that the entire estate might be closed promptly, are allowed to linger on the State court calendar for years and years without action. Frequently the State courts are not as interested in disposing of these matters as is the bankruptcy court.
>
> The State court is not charged with the duty of seeing to the prompt administration of the estate, whereas the bankruptcy court is, so that very often those cases are allowed to languish without action for a considerable period of time. The result is that many disputes, whether to recover accounts receivable or otherwise, and which ought to be heard with promptness within the framework of a single court sitting in bankruptcy, are either settled by the trustee for a pittance, or they are abandoned entirely rather than risk the costly delay to which that litigation is usually subjected in a nonbankruptcy forum, which so often is lacking in enthusiasm for bankruptcy cases in particular, and the complexity and apparent novelty of bankruptcy disputes in general." (1975 House Hearings at 145.)

Fourth, Congress concluded that bankruptcy courts should be presided over by bankruptcy specialists:

(footnote continued from preceding page)

ruptcy Judge Kline testified that district court judges face "impossible pressures." 1977 Senate Hearings at 439. The situation is even worse today. Civil case filings are up over 30% since 1978 and the number of civil filings per authorized judgeship has also risen since 1978. 1981 AO Report, *supra* note 3, at 56, 59.

> ". . . bankruptcy judges today comprise a de facto specialized court system within the district courts . . . . Approximately 190 full-time and 30 part-time bankruptcy judges throughout the country handle the approximately 250,000 cases now pending in the courts with little direct supervision from the district judges.
>
> As the system has evolved, district judges have removed themselves further and further from the consideration of bankruptcy matters. The area has become too specialized and requires too much expertise to be able to be handled on an ad hoc basis by a generalist." (1977 House Report at 9.)[11]

Fifth, Congress found that there was a compelling need to enlarge the jurisdiction of the bankruptcy courts to include all cases involving the debtor:

> "A major impetus underlying this reform legislation has been the need to enlarge the jurisdiction of the bankruptcy court in order to eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction, a wasteful remnant of the referee system left over from the pre-Chandler Act era. For fully four decades, and more notably during the present decade, referees in bankruptcy have served as trial judges of the bankruptcy court whose orders are final unless a timely appeal is taken to the district court. Yet the jurisdictional limitations presently imposed on the bankruptcy courts have

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[11] In providing for adjudication by specialists, Congress evidenced a "practical concern for accurate results," which Justice Blackmun has called "the focus of the Due Process Clause" in the Article III context. *United States* v. *Raddatz*, 447 U.S. 667, 684 (1980) (Blackmun, J., concurring).

> embroiled the court and the parties in voluminous litigation whose sole function is to determine whether the court possesses the requisite summary jurisdiction to determine the merits of issues often necessarily heard by the court in determining its jurisdictional question. Upon a finding that it lacks summary jurisdiction, the bankruptcy court is required to dismiss the action, whereupon it is necessary for the parties to proceed anew with a plenary action in either the U.S. district court or an appropriate state court to try issues already substantially tried in the summary proceedings before the bankruptcy court. Frequently, the liquidation of bankrupt estates and the rehabilitation of debtors are significantly prejudiced thereby." (1978 Senate Report at 17-18.)[12]

Originally, the House bill provided for an Article III bankruptcy court separate and independent from the district court. Title 28 § 151 under H.R. 8200. The proposal of an independent court received overwhelming support:

> "The Commission on the Bankruptcy Laws proposed it. The National Bankruptcy Conference testified in support of the proposition. The Commercial Law League of America and the American Bankers Association urged the Subcommittee to create an independent court system. Finally, the American Bar Association, at its 1976 meeting, and the Association of the Bar of the City of New York have called for the creation of an independent bankruptcy court.

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[12] Numerous witnesses opposed retention of the summary-plenary distinction. *E.g.*, 1975 House Hearings at 179, 539, 1044; 1975 Senate Hearings at 35, 125; 1977 Senate Hearings at 832; 1977 House Hearings at 161, 217, 239, 241-42, 254; 1977 House Report at 45 n.27.

> During 35 days of hearings in the House and 20 days in the Senate, not one witness reached the conclusion that the present bankruptcy court system should be retained." (1977 House Report at 18; footnotes omitted.)

In spite of its widespread support, there was intense opposition to the creation of an Article III bankruptcy court based, in part, upon the expense associated with tenured judges.[13] As a result of this opposition, Congress, pursuant to its Article I power to establish uniform laws of bankruptcy, fashioned a compromise bill which, as in *Palmore,* benefits from the economy of utilizing non-tenured judges to meet "specialized" needs and yet preserves Article III protections.[14]

As enacted, the Reform Act creates the bankruptcy court as an adjunct to the district court (28 U.S.C. § 151) and limits the power of the bankruptcy court by providing that it "may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." 28

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[13] *See, e.g.,* 123 Cong. Rec. H 11706-07 (daily ed. Oct. 27, 1977); 123 Cong. Rec. H 11767-68 (daily ed. Oct. 28, 1977); 1977 House Hearings at 8, 67, 128 and 219.

[14] The volume of bankruptcy cases fluctuates from year to year. For example, from 1975 to 1978 the number of bankruptcy filings declined by a fifth; from 1979 to 1980, it increased by nearly three-fifths. See 1981 AO Report, *supra* note 3, at 8. Had Congress created an Article III bankruptcy court, it would have undertaken an obligation to support a fixed number of bankruptcy judges regardless of any reduction in the need for such judges in the future.

For an account of the legislative history of H. R. 8200, *see* Clarkson, *A Brief Overview of the Congressional Debate on the Bankruptcy Court System,* Annual Survey of Bankruptcy Law 63 (1979); Klee, *A Legislative History of the New Bankruptcy Law,* 28 De Paul Law Review 941 (1979).

U.S.C. § 1481.[15] In addition, the Reform Act assures constitutionality by providing for review by an Article III tribunal. 28 U.S.C. §§ 1293 and 1334. *See Crowell* v. *Benson*, 285 U.S. 22 (1932). Thus, the Reform Act reflects recognition of the constitutional limitations on Article I courts and imposes restrictions on the powers of the bankruptcy court to conform to those limitations. As stated in the Senate Report on the compromise bill:

> "The expanded jurisdiction vested in the U.S. district courts may be delegated by statute for exercise exclusively by bankruptcy judges, subject always to review, as under present law, by the district courts. Certain perceived constitutional impediments to the exercise of the judicial power of the United States by non-tenured judges are thus eliminated." (1978 Senate Report at 16; footnote omitted.)

The testimony of Third Circuit Judge Ruggero J. Aldisert was persuasive on the issue of the constitutionality of an Article I bankruptcy court with expanded jurisdiction. Judge Aldisert stated:

> ". . . when it came to the question, not as to a decision as to whether there should be an Article III judge or another type of judge, but strictly from the jurisprudential standpoint, from the standpoint of the constitutionality of the bankruptcy judge assuming increased powers, there was unanimity in [the Ad Hoc Committee on Bankruptcy Legislation of the Judicial Conference] and there was unanimity

[15] These limitations on the power of an Article I bankruptcy court were suggested by various constitutional scholars whose opinions were solicited by the Hon. Peter W. Rodino, Jr., Chairman of the House Comm. on the Judiciary. *See* 1977 House Report at 63, 79, 84 and 86.

> in the Judicial Conference of the United States that Article III status was not necessary to assume that expanded jurisdiction. Circuit conferences consisting of every district and every circuit judge within a circuit, have concluded that an Article III judge is not necessary. The only circuit conferences that have not so concluded are the first circuit and the District of Columbia Circuit, because the question was not presented to them." (1977 Senate Hearings at 413-14.)[16]

The legislative history here, even more strongly than in *Palmore*, demonstrates the necessity for Article I courts empowered to adjudicate with respect to a "specialized" area "having particularized needs and warranting distinctive treatment." *Palmore, supra,* 411 U.S. at 408.

II.

The Change in Jurisdiction of the Bankruptcy Court From Prior Law Is Constitutionally Insignificant.

Under 28 U.S.C. § 1471(c), the bankruptcy court has jurisdiction of all civil proceedings arising in or related to debtor cases. Under the Bankruptcy Act, the bankruptcy court had this same jurisdiction where the defendant consented. Section 2a(7), formerly 11 U.S.C. § 11a(7). Hence, the only change under the Reform Act affecting the subject matter jurisdiction of the bankruptcy court is the removal of the requirement of consent to jurisdiction by a defendant. The removal of the requirement of consent, however, is not constitutionally significant because, as this Court has held:

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[16] Judge Aldisert's testimony related to §§ 201 and 202 of S.2266 pursuant to which the bankruptcy courts, to the extent authorized by rule or order of the district court, had jurisdiction to hear all "civil proceedings by or against" a debtor.

> "Unlike an objection to venue, lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties." (*Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934).

See also, California v. *LaRue*, 409 U.S. 109, 112-13 n.3 (1972); *Mansfield, C. & L.M. Ry. Co.* v. *Swan*, 111 U.S. 379, 382 (1884). Thus, the bankruptcy court under prior law had jurisdiction which was constitutionally equivalent to that granted in 28 U.S.C. § 1471(c).

Under the Bankruptcy Act of 1898, bankruptcy courts had summary jurisdiction of all actions to recover preferences, fraudulent transfers and other property of the debtor. Sections 60b, 67e, and 70e(3) of the Act, formerly 11 U.S.C. §§ 96b, 107e and 110e(3); *see Katchen* v. *Landy*, 382 U.S. 323 (1966); 8 *Collier on Bankruptcy* ¶ 3.01[2] (14th ed. 1978). In addition, bankruptcy courts had jurisdiction of other controversies where the defendant consented.

Section 2a(7), formerly 11 U.S.C. § 11a(7), provided that bankruptcy courts could exercise jurisdiction at law and in equity:

> " . . . *where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy,* by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse. . . ." (Emphasis added.)

Section 23, formerly 11 U.S.C. § 46, provided:

> "b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the

> bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, *unless by consent of the defendant,* except as provided in sections 60, 67 and 70 of the Act." (Emphasis added.)

This Court has expressly held that jurisdiction pursuant to Section 23 can be conferred by consent upon a non-Article III bankruptcy referee. *MacDonald* v. *Plymouth Trust Co.*, 286 U.S. 263 (1932).[17] *MacDonald* involved the jurisdiction of the bankruptcy referee to hear an action for the recovery of a preferential payment under a statute which conferred such jurisdiction upon the Article III district court. The Court wrote:

> "Where a suit by the trustee is plenary in character, as are those authorized by § 60(b), both parties to it are entitled to claim the benefits of the procedure in a plenary suit, not available in the summary method of procedure which, under the provisions of the Bankruptcy Act, is employed by the referee. A denial of those benefits would be in effect a denial of the right to a plenary suit, to which both parties are entitled under § 60(b). *But it does not follow that this privilege, extended for the benefit of a suitor, may not, like the right to trial by jury, be waived* [citations omitted], *and, being waived, that the referee is without the power given to courts of bankruptcy to decide the issues.*" (286 U.S. at 266-67; emphasis added.)

Moreover, in promulgating the Rules of Bankruptcy Procedure in 1973, this Court again recognized that bankruptcy

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[17] *See also, Cline* v. *Kaplan*, 323 U.S. 97, 99 (1944); *Phelps* v. *United States*, 421 U.S. 330, 336 n.6 (1975); *Page* v. *Arkansas Gas Corp.*, 286 U.S. 269, 271-72 (1932); 1977 House Report at 44 (*quoting* Report of the Commission on the Bankruptcy Laws of the United States 88 (1973)); D. Cowans, 2 Bankruptcy Law & Practice § 576 at 218-19 (1978).

courts have jurisdiction by consent of the parties over cases relating to the debtor. Rule 102 provides for automatic reference of bankruptcy cases to referees (defined as bankruptcy judges in Rule 901). And Rule 915(a) provides:

> ". . . a party waives objection to jurisdiction of an adversary proceeding or a contested matter and thereby consents to such jurisdiction if he does not make objection by a timely motion or answer, whichever is first served."

If this Court holds that the jurisdiction in § 1471(c) is unconstitutional, such a holding would cast doubt upon all of the cases decided under prior law, where jurisdiction was founded on consent. Certainly, there is a strong presumption against such a result. *Life & Casualty Co.* v. *McCray*, 291 U.S. 566, 572 (1934) ("The presumption of validity which applies to legislation generally is fortified by acquiescence continued through the years."); *United States* v. *National Dairy Corp.*, 372 U.S. 29, 32 (1963); *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960).

Indeed, this Court has recognized a duty to inquire into the existence of subject-matter jurisdiction *sua sponte*. *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934); *Mansfield, C.&L.M. Ry. Co.* v. *Swan*, 111 U.S. 379, 382 (1884). Thus, the holding in *MacDonald* v. *Plymouth Trust Co.*, 286 U.S. 263 (1932) (that a bankruptcy referee had jurisdiction by consent over a plenary action) should compel a holding by this Court that the grant of jurisdiction to the present bankruptcy court is constitutional.

III.

Article III Concerns Are Protected Under the Reform Act.

The fundamental concern of the framers of the Constitution which was expressed in the tenure and salary provisions of Article III was that the independence of the judiciary be protected against undue influence from the executive and legislative branches of the government. As this Court has written:

> "The anxiety of the framers of the Constitution to preserve the independence especially of the judicial department is manifested by the provision now under review [Art. III, § 1], forbidding the diminution of the compensation of the judges of courts exercising the judicial power of the United States.
>
> * * *
>
> Thus, in The Federalist, No. 78, Hamilton said—'The complete independence of the courts of justice is peculiarly essential in a limited Constitution.' And, in No. 79—'Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*'" (*O'Donoghue* v. *United States*, 289 U.S. 516, 531 (1933); emphasis in original.)

A comparison of the tenure and salary provisions of Article III judges and bankruptcy judges reveals that the Article III concerns of the framers of the Constitution are fully protected by the provisions of the Reform Act. First, Article III judges are appointed by the President, with the

advice and consent of the Senate. 28 U.S.C. §§ 44, 133. Similarly, bankruptcy judges are appointed by the President, with the advice and consent of the Senate. 28 U.S.C. § 152.

Article III judges hold office "during good behavior." 28 U.S.C. §§ 44, 134. Bankruptcy judges are appointed for a term of 14 years. 28 U.S.C. § 153(a). However, judges are usually appointed late in their legal careers. Thus, as a practical matter, an appointment of 14 years is often equivalent to life tenure. (The average tenure of all sitting Article III judges, including senior judges, is 12.1 years. *See* memorandum of R. Glenn Johnson to Joseph Bobek, Assistant Chief, Financial Management Division of the Administrative Office of the United States Courts, dated May 28, 1981, annexed hereto as Appendix A.)

Article III judges can be removed from their positions by Congress, pursuant to its impeachment powers. U.S. Const., Art. III, § 1; Art. I, § 2, cl. 5 and § 3, cls. 6 and 7. Bankruptcy judges, on the other hand, can be removed only by other judges. They are subject to removal "for incompetency, misconduct, neglect of duty, or physical or mental disability" by the judicial council of the circuit in which they serve. 28 U.S.C. § 153(b). Hence, in this respect, the Reform Act can be said to be more protective of the independence of judges from the legislature than is the Constitution.

The salaries of Article III judges are not subject to reduction during their continuance in office. U.S. Const., Art. III, § 1. While Congress can reduce the salaries of all bankruptcy judges, history suggests that such an event is unlikely.[18] Moreover, it can hardly be said that Article III

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[18] It is clear that Congress cannot seek to exert pressure on bankruptcy judges by reducing the salaries of only some of them. *See United States* v. *Lovett*, 328 U.S. 303, 315-16 (1946).

judges are insulated from financial concerns. Indeed, the Chief Justice has rightly called compensation the Federal judiciary's "most pressing issue." Report of the Commission on Executive, Legislative and Judicial Salaries 42 (1980) [hereafter Salaries Report]. While the legislature and the executive cannot reduce the wages of Article III judges, they certainly have the ability effectively to reduce wages by failing to compensate for inflation. *See Atkins* v. *United States,* 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied,* 434 U.S. 1009 (1978); *cf., United States* v. *Will,* 449 U.S. 200, 219-20 (1980).

In short, in a time when members of the federal judiciary are forced to resign from the bench because of inadequate compensation, *see* Salaries Report at 28, it seems senseless to invalidate the jurisdiction of a court because of the remote possibility that its judges might have their salaries reduced at some future time.

CONCLUSION

For the reasons set forth above, the holding of the district court should be reversed and this Court should hold that 28 U.S.C. § 1471(c) is a valid enactment under Congress' Article I powers.

Dated: December 24, 1981
New York, New York

Respectfully submitted,

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APPENDIX A

UNITED STATES GOVERNMENT
MEMORADUM

Date: May 28, 1981

Reply to Attn of: R. Glenn Johnson

Subject: Average Age and Tenure of Judges

To: Joseph Bobek, Asst. Chief, Financial Management Division

Here are the statistics you requested.

	Numbers	Average Age	Average Tenure
Article III Judges	881	51.0	12.1
Bankruptcy Judges	224	55.2	10.5

If you have further questions, please contact A. Richard Grubbs of my staff. (633-6168)